

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-4092

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-4092

HARDER SERVICES, INC.

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

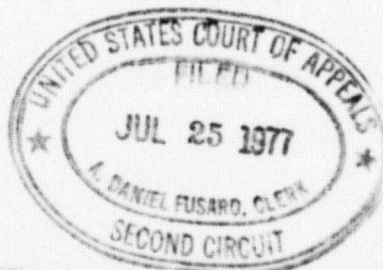
Respondent-Appellee

RECORD APPENDIX

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UNITED STATES TAX COURT

General Docket

Docket No. 1867-74

HARDER SERVICES, INC. (FORMERLY: HARDER	:
EXTERMINATION SERVICE, INC.)	:
Hempstead, New York 11550	:
	Petitioner,
	:
vs.	:
	:
COMMISSIONER OF INTERNAL REVENUE,	:
	Respondent.
	:

Appearances for Petitioner:

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1974

March 15 - Petition Filed: Fee paid March 15, 1974.
March 15 - Request by Petr. for trial at New York, N.Y.
May 13 - Answer by Resp. filed.
Feb. 5 - Notice of trial on May 12, 1975 at New York, N.Y.
May 12, 14 - Trial, at New York, N.Y. before Judge Fay.
Stipulation of facts with att. exh. filed
May 14, 1975.

1975

- June 4 - Transcript of May 14, 1975 received.
- June 23 - Motion by Resp. to extend time to July 30, 1975 within which to file Original Brief. (No Obj. Petr.)
- June 24 - Motion by Petr. to extend time to Aug. 15, 1975 and Sept. 15, 1975 within which to file Original Briefs and Reply Briefs, respectively. (No Obj. Resp.)
- Aug. 12 - Motion by Resp. for extension of time to Aug. 22, 1975 within which to file Brief.
- Sept. 8 - Brief for Resp. filed.
- Sept. 8 - Brief for Petr. filed.
- Oct. 1 - Motion by Resp. to extend time to Oct. 22, 1975 within which to file Reply Brief. (No Obj. Petr.)
- Oct. 22 - Motion by Petr. to extend time to Oct. 29, 1975 within which to file Reply Brief. (No Obj. Resp.)
- Oct. 22 - Reply Brief for Resp. filed.
- Oct. 29 - Reply Brief for Petitioner filed.

1976

- Dec. 27 - Findings of Fact & Opinion filed, Judge Fay. Decision will be entered for Resp.
- Dec. 29 - Decision entered, Judge Fay.

APPELLATE PROCEEDINGS

1977

- Mar. 25 - Notice of Appeal to U.S.C.A., Second Circuit, filed by Petr.
- Mar. 28 - Notice of Filing with copy of notice of appeal sent to Mr. Meade Whitaker, Chief Counsel.
- Mar. 28 - Notice, to parties, of assembling and date for transmission of the record.

UNITED STATES TAX COURT
WASHINGTON

HARDER SERVICES, INC.)
(Formerly: Harder Extermination)
Service, Inc.),)
)
Petitioner,))
)
v.)
)
COMMISSIONER OF INTERNAL REVENUE,))
)
Respondent.)

Docket No. 1867-74

D E C I S I O N

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed December 27, 1976, it is

ORDERED AND DECIDED: That there are corporate income tax deficiencies due from petitioner, as transferee of Harder Tree Service, Inc., for the taxable years and in the amounts as follows:

<u>TYE 12/31</u>	<u>Deficiency</u>
1964	\$ 1,399.99
1965	1,252.50
1966	6.22
1968	15,008.04

(Signed) Wm. M. Fay
Judge

Entered: DEC 29 1976

67 T. C. No. 42

UNITED STATES TAX COURT

HARDER SERVICES, INC. (FORMERLY: HARDER EXTERMINATION
SERVICE, INC.), Petitioner v. COMMISSIONER OF INTERNAL
REVENUE, Respondent

Docket No. 1867-74.

Filed December 27, 1976.

Harder Tree in 1964 agreed to acquire by merger Cardinal Maintenance, which was then owned by Rogers. As a result of the merger, Rogers received 11 percent of the outstanding stock of Harder Tree and entered into an employment agreement providing, inter alia, that if his employment were to be terminated by Harder Tree, Rogers could require the company to repurchase his Harder Tree stock. The price for such a repurchase was to be determined by a formula based upon gross sales. The business of Cardinal Maintenance was not profitable following its acquisition by Harder Tree. In 1967 Rogers' employment was terminated and his Harder Tree stock was repurchased by Harder Tree for \$100,677.44, the amount computed pursuant to the formula provided in the employment contract. The principals of Harder Tree considered this price far in excess of the true value of

SERIALIZED DEC 27 1976

stock repurchased, but paid it in order to eliminate Rogers' interest in the company. The business of Cardinal Maintenance was thereafter sold by Harder Tree. In 1968, Harder Tree was merged into petitioner.

Held: (1) The payment of \$100,677.44 by Harder Tree to Rogers for the repurchase of his Harder Tree stock was a capital transaction under sec. 311(a), I.R.C. 1954, giving rise to no taxable gain or loss. The payment did not represent an ordinary and necessary business expense under sec. 162, I.R.C. 1954, nor an additional cost to Harder Tree of its investment in Cardinal Maintenance. (2) Petitioner is liable, as transferee, for income tax deficiencies of Harder Tree.

John K. Antholis, for the petitioner.

Marian L. Westen and Theodore J. Kletnick, for the respondent.

FAY, Judge: Respondent determined corporate income tax deficiencies against petitioner, as transferee of Harder Tree Service, Inc., for the taxable years and in the amounts as follows:

<u>TYE 12/31</u>	<u>Deficiency</u>
1964	\$ 1,399.99
1965	1,252.50
1966	6.22
1968	15,008.04

The principal issue for decision is whether all or any portion of the sum of \$100,677.44 paid by Harder Tree Service, Inc., in 1967 for the repurchase of certain of its outstanding shares is deductible in connection with the termination of business of a subsidiary in 1967. The deficiencies determined for the years 1964, 1965, 1966 and 1968 were based solely upon adjustments in the allowable net operating loss carrybacks and carryforward resulting from the disallowance of the deduction claimed in 1967. In the event that respondent's determinations as to this issue are sustained, we must then address a second issue as to whether petitioner may be held liable, as transferee, for the tax deficiencies of Harder Tree Service, Inc.

FINDINGS OF FACT

Some of the facts have been stipulated, and the stipulation of facts, together with the exhibits attached thereto, are incorporated by this reference.

Petitioner, Harder Services, Inc. (formerly Harder Extermination Service, Inc.), was incorporated in the State of New York in 1932. At the time of the filing of the petition herein its principal office was located in Hempstead, New York.

Harder Tree Service, Inc. (hereinafter sometimes referred to as "Harder Tree") was incorporated in the State of New York in 1957. It filed corporate income tax returns on Form 1120 for each of the years 1964 through 1968.

Petitioner and Harder Tree were controlled by F. Kenne Harder and his wife, and were engaged in the pest control business. Frank Harder, the son of F. Kenneth Harder, was also active in these businesses, having served as president of petitioner and an officer¹ and director of Harder Tree. Over the years since the founding of petitioner in 1932, additional corporations were acquired or established by the Harder family to engage in related businesses, including Harder Jersey Pest Control, Inc., and Harder-Woodland Tree Experts Co., Inc.

In 1964 the Harders began to consider the acquisition of an office maintenance and cleaning company. They believed that such an acquisition would complement their

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For convenience hereinafter F. Kenneth Harder will be referred to as "Mr. Harder" and Frank Harder will be referred to as "Frank".

pest control operations and put them in a better position to compete with larger companies which offered pest control services as part of, or in addition to, their normal office cleaning services. In a discussion between Mr. Harder and Frank it was suggested that one possible acquisition might be Cardinal Maintenance Corp., the firm which had the cleaning contract on the Harder offices. The owner of Cardinal Maintenance Corp. was Philip A. Rogers, whom the Harders had known for many years. Rogers was the brother-in-law of Richard Valentine, an attorney whom the Harders had known since he was a child.

Frank then broached the subject to Rogers, who was receptive to the idea of his company becoming part of the Harder organization. Eventually the details of a possible merger transaction were discussed by Frank, Rogers and Valentine, and documents were prepared by Valentine. Since Valentine had in the past served as attorney for both Rogers and the Harders in other matters, he was the only attorney involved in the merger planning, and he purported to represent both sides in the proposed merger transaction. Mr. Harder did not concern himself with the details of the transaction which he left up to Valentine. Valentine prepared the documents for the transaction and presented them to the Harders for review

on July 23, 1964. The documents were reviewed by Mr. Harder and Frank and by another officer of the Harder companies, as well as the Harder's outside accountant. On July 31, 1964, a closing was held, attended by Mr. Harder, Frank, their accountant, Rogers and Valentine. At the closing Valentine reviewed the Agreement of Merger with all of the persons attending.

The relevant provisions of the merger plan executed July 31, 1964, may be summarized as follows: Rogers' company, Cardinal Maintenance Corp., was merged into Harder Tree Service, Inc., and the stock of Cardinal Maintenance Corp. was cancelled. Twenty-two shares of Harder Tree common stock were issued to Rogers, representing 11 percent of the total of 200 Harder Tree shares outstanding. The balance of such outstanding shares was owned by the Harders. Concurrently, Harder Tree created a new wholly owned subsidiary named Cardinal Maintenance, Inc.² The assets and business acquired by Harder Tree in the merger were contributed as capital to the newly created subsidiary.

² Hereinafter sometimes referred to as "Cardinal." This newly created subsidiary of Harder Tree is to be distinguished in name from Rogers' former company, Cardinal Maintenance Corp. (hereinafter sometimes referred to as "Old Cardinal"), which was merged into Harder Tree.

At the time of the merger closing Harder Tree entered into an employment contract with Rogers, at a minimum salary of \$1,000 per month; he was to give his best effort and skill exclusively to the business and interests of Harder Tree and its affiliates; he was to be precluded from competing with Harder Tree's or Cardinal's business for five years after he terminated his employment; and he was to be precluded from divulging trade secrets during his employment and for five years after termination of his employment. Either party had the right to cancel and terminate the employment upon two weeks' notice to the other party. Rogers was also elected a director and vice-president of Harder Tree.

As an integral part of the merger transaction there was also executed a "Stock Option Agreement" between Harder Tree Service, Inc., F. Kenneth Harder, and Philip A. Rogers. Among other things, that agreement provided a grant to Harder Tree of an option to purchase any or all of the shares of stock of Harder Tree owned by

Rogers for a period of six months commencing with the date of termination of Rogers' employment with Harder Tree for any reason. Harder Tree granted to Rogers, or his trustees, an option to sell to Harder Tree all or any part of the shares of stock of Harder Tree owned by Rogers for a period of six months commencing on the date of Rogers' death; for a period of six months commencing with the date of termination of Rogers' employment with Harder Tree for any reason other than death, or his resignation as an employee of Harder Tree; or for a period of six months from the date of Rogers' resignation because Rogers' annual rate of salary, excluding bonuses, in the two calendar years immediately preceding the date of his resignation was below \$12,000. The option price to be paid by Harder Tree in the event that Harder Tree or Rogers exercised their options was an amount determined by:

- (a) Multiplying the value of all the outstanding stock of Harder Tree by a fraction of which the numerator is the number of shares being sold and the denominator is the total number of shares of Harder Tree outstanding.

(b) The value of all the outstanding stock of Harder Tree was to be an amount equal to the average annual gross receipts of Harder Tree and all of its subsidiaries on a consolidated basis for 24 calendar months ending on the last day of the calendar month immediately preceding the month in which the right to exercise arose, except that if the right to exercise arose prior to August 1, 1967, such value was to be an amount equal to such annual gross receipts for 12 calendar months.

For the first two years following the merger transaction Cardinal failed to operate profitably, although realizing substantial gross sales. For the calendar year 1966, Cardinal had sales of \$541,139.58 and its parent, Harder Tree, had sales of \$374,109.85.

During 1966 the Harders' accountant, Keith Baker, recommended to Mr. Harder that all of the several Harder companies be merged into a single entity for administrative and accounting reasons and for possible financial and tax benefits. In the course of analyzing the feasibility of such a combination, Baker had occasion to review the employment

and option agreements executed in 1964 between Harder Tree and Rogers. In November 1966 Baker sent a memorandum to Mr. Harder expressing the opinion that if the desired merger of the Harder companies were to be accomplished the Rogers' stock option agreement must be cancelled and a new agreement negotiated, for the following reasons:

1. In a merger, Harder Tree would be dissolved and no longer be a party to the agreement.
2. The consolidated sales of Harder Tree and Cardinal would become commingled with the sales of the other Harder companies, thus rendering inoperable the method prescribed for the valuation of stock under the option agreement.
3. Rogers would become the owner of stock of the merged company, thereby acquiring an interest in the assets and profits of all five of the Harder companies, rather than just his interest in the operations of Harder Tree and Cardinal.
4. The valuation method prescribed in the option agreement was improper since it is based upon gross sales, presumably upon the original assumption that such sales would yield normal rates of profit, increasing as sales increase,

whereas in the case of Cardinal no net profits had been realized after more than two years of operations.

5. The continued existence of the option agreement would probably foreclose the newly merged company from obtaining major debt or equity financing.

At this point for the first time Mr. Harder and Frank realized the significance of the valuation method prescribed in the 1964 Rogers' option agreement. Although they had both reviewed the agreement prior to its execution, they had failed to realize that an option price formula based upon gross sales without regard to net income might result in a price totally unrelated to the true value of the stock. In reviewing the 1964 merger documents, the Harders had relied heavily upon their confidence in Valentine, the trusted attorney and friend of both parties to the agreement.

After receiving Baker's memorandum concerning the Rogers' stock option agreement, and in light of the fact that the Cardinal operation, managed by Rogers, was not profitable, Mr. Harder determined that it would be necessary to

terminate the relationship with Rogers. Although the 1964 employment agreement provided for termination by either party, the stock option agreement provided that if Rogers' employment were to be terminated by Harder Tree, Rogers could force Harder Tree to repurchase his 22 shares of Harder Tree stock at a price determined by the formula keyed to gross sales. If Rogers were to be dismissed at the end of 1966, the repurchase price under the formula would be \$100,677.44, an amount which the Harders considered totally unrelated to the true value of Rogers' 22 shares.

At this point Mr. Harder retained Alfred A. Marra, an attorney, to advise him with respect to the Rogers' situation. Marra reviewed the entire history of the 1964 transaction and formed an opinion that the stock option agreement should be abrogated on the basis that Valentine should not have represented both sides of the transaction and that the valuation formula under the agreement drafted by Valentine was unconscionable since it was based on gross sales and not on net earnings. Marra recommended in the strongest terms that the Harders take the matter to the courts and seek to have the agree-

ment voided. Mark Wood, treasurer of Harder Tree, also had reservations about the formula and thought that the formula price for the stock was completely out of line with its true value. He brought this matter to the attention of, and discussed it with, Mr. Harder and Frank.

However, because of the involvement of Valentine, who had been a long-time friend of the Harders and who was Rogers' brother-in-law, the Harders did not wish to litigate the matter. Among other considerations they felt that the Valentine family was too wealthy and powerful to take on in a court battle and that such litigation might ultimately be harmful to their business. Accordingly, the Harders decided to resolve the matter by simply paying Rogers the \$100,677.44 formula repurchase price for his stock, although they believed such price to be considerably in excess of the true value of such stock.

Thus, in January 1967, Harder Tree formally terminated the employment of Rogers and exercised its option to purchase his stock. In February 1967, Harder Tree paid Rogers \$100,677.44, Rogers delivered his 22 shares to Harder Tree, and Rogers was removed as an officer and director of both Harder Tree and Cardinal.

In September 1967 the Harders took steps to sell the business and the assets of Cardinal, and in December 1967, Cardinal was formally dissolved.

In December 1968 all of the remaining Harder companies, including Harder Tree, were merged into Harder Extermination Services, Inc., the petitioner herein. The name of the surviving corporation was changed to Harder Services, Inc.

In connection with this merger all of the participating corporations executed a "Joint Agreement of Merger and Certificate" which contains the following language pertinent herein:

[A]ll rights of creditors and all liens upon the property of any of said corporations, parties hereto, shall be preserved unimpaired, and all debts, liabilities and duties of * * * HARDER TREE SERVICE, INC. shall thenceforth attach to the said surviving HARDER EXTERMINATION SERVICE, INC., and may be enforced against it to the same extent as if debts, liabilities and duties had been incurred or contracted by it.

The \$100,677.44 paid by Harder Tree to Rogers in 1967 was treated on the books of Harder Tree as an additional investment in its subsidiary, Cardinal, bringing its total basis in its Cardinal investment to \$103,520.60. In its income tax return for 1967 Harder Tree claimed the following deduction in connection with the dissolution of Cardinal:

Loss on investment in and advances to Cardinal Maintenance, Inc.--a wholly owned subsidiary dissolved in 1967	\$110,563.30
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This amount claimed was computed as follows:

Total amount treated as capital contri- butions to Cardinal (i.e., basis of investment)	\$103,520.60
Uncollectible liability from Cardinal to Harder Tree	<u>7,042.70</u>
Total	\$110,563.30

Harder Tree's 1967 return reported a net loss of \$108,670.13, taking into account the above-mentioned deduction of \$110,563.30 with respect to Cardinal. This net loss was then applied as a net operating loss carryback and carryforward to reduce the net income of Harder Tree (and its successor) for the years 1964 through 1966 and 1968 through 1972. Respondent has adjusted the reported 1967 net loss and resulting carryover and carryback deductions for 1964 through 1966 and 1968 to the extent of \$100,677.44, the portion of the written-off investment in Cardinal representing the payment to Rogers in January 1967.

OPINION

The central issue in this case is the proper treatment for tax purposes of the \$100,677.44 paid by Harder Tree to Rogers in 1967. Respondent contends that the payment was simply a purchase by Harder Tree of 22 shares of its outstanding stock from Rogers, and that under the well-settled rule of Internal Revenue Code section 311(a)³ such a repurchase is a capital transaction giving rise to no deductible loss. Sec. 1.311-1(a), Income Tax Regs.; Rev. Rul. 55-462, 1955-2 C.B. 221.

Petitioner, on the other hand, asserts that the purpose of the \$100,677.44 payment to Rogers was not really to repurchase his shares (which were allegedly worth only a fraction of that amount), but to terminate the Rogers' stock option agreement, which represented an onerous ongoing contingency adversely affecting Harder Tree's business. Thus, petitioner contends, in substance the payment represented an ordinary and necessary business expense deductible under section 162. Alternatively, petitioner contends that

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Unless otherwise indicated, all section references herein are to the Internal Revenue Code of 1954, as amended.

to the extent that the amount paid exceeded the fair market value of the stock reacquired, such excess is deductible as additional compensation for services⁴ or termination payments.⁴

The issue of the deductibility of a stock repurchase as an ordinary and necessary business expense under section 162 has been considered in several cases. In Capitol Indemnity Ins. Co. v. Commissioner, 237 F.2d 901 (7th Cir. 1956), revg. 25 T.C. 147 (1955), the taxpayer, an insurance company, was a party to an onerous agency contract which threatened the survival of its business. As a part of an agreement for the cancellation of this contract, the taxpayer agreed to make payment to certain of its founding stockholders. These payments (which apparently did not involve reacquisition of the shares of the stockholder-

⁴

In the preparation of its 1967 income tax return Harder Tree treated the payment to Rogers as in substance an additional investment in its Cardinal subsidiary, having the effect of increasing its tax basis in Cardinal. The stock in Cardinal, at its increased basis, was then written off under sec. 165(g), as worthless in that same year. As its "primary position" on brief, petitioner contends that, although in form the Rogers payment appears to be a repurchase of stock, in substance it represented a delayed cash payment, in lieu of the 22 shares of Harder Tree, for the acquisition of the Cardinal assets and business from Rogers more than two years earlier. The only merit which we can find in this totally theoretical reconstruction of the transaction (which theory is inconsistent with petitioner's own evidence in support of the deduction under sec. 162) is that it dutifully attempts to support the approach originally taken in the tax return.

recipients) were held not to be dividends, but deductible as ordinary and necessary business expenses.

In Five Star Manufacturing Company v. Commissioner, 355 F.2d 724 (5th Cir. 1966), revg. and remanding 40 T.C. 379 (1963), Kincade and Smith were equal co-owners of the taxpayer corporation. The survival of the corporation was dependent upon the continuance of a certain patent licensing agreement. After Smith became heavily indebted to the corporation and the corporation indebted to the patent owner, litigation ensued. The owner of the patent refused to continue the licensing agreement with the taxpayer as long as Smith remained a co-owner. Eventually Smith's stock in the corporation was put up for judicial sale, and the corporation, as the only bidder, repurchased the stock to eliminate Smith's interest. The entire purchase price was claimed as a deductible expense under section 162. The Court stated, in allowing the deduction,

It can scarcely be held that the payment to Smith was for the acquisition of a capital asset, but rather one which would permit Five Star again to use assets for income production by freeing its management from unwarranted fetters.
[355 F.2d at 727]

See also United States v. Smith, 418 F.2d 589 (5th Cir. 1969).

In H. and G. Industries, Inc. v. Commissioner, 495 F.2d 653 (3d Cir. 1974), affg. 60 T.C. 163 (1973), the taxpayer had issued certain convertible preferred stock which provided for an 8 percent dividend and a 12-1/2 percent additional participation in annual net profits. It also imposed certain restrictions on the taxpayer's future financial activities. Four years later the taxpayer exercised its call privilege and redeemed the preferred stock, paying a call premium of \$20 per share (20 percent). Taxpayer claimed the aggregate amount of the call premium as a section 162 deduction on the theory that the dividend and profit participation and other restrictive provisions of the preferred stock had become an onerous burden on the corporation, and that the call premium necessary to redeem the stock was an ordinary and necessary expense to relieve this ongoing burden. Taxpayer relied heavily upon Five Star Manufacturing Co. v. Commissioner, supra, and other cases permitting deduction for payments to be relieved of onerous business contracts. The Court, however, in H. and G. Industries distinguished Five Star Manufacturing, holding that the redemption of the preferred stock was merely a refinancing transaction by a financially healthy corporation

and was not, as in Five Star, necessary to the survival of the corporation. The Court specifically stopped short of holding, as respondent herein urges us to hold, that section 311 is an absolute bar to a section 162 deduction when stock is redeemed to avoid an allegedly onerous contract.

A recent case closely analogous to the instant case is Jim Walter Corporation v. United States, 498 F.2d 631 (5th Cir. 1974). Here the taxpayer corporation repurchased certain of its own outstanding warrants, which warrants, if not repurchased, would have entitled the holders to purchase either stock of the corporation or a combination of stock and bonds. The taxpayer sought to deduct the total warrant repurchase cost on the theory that the purpose of the repurchase was to avoid the potential future expense of bond interest should bonds have to be issued upon future exercise of the warrants. In analyzing the taxpayer's position, the Court began with the following principle of United States v. Gilmore, 372 U.S. 39 (1963):

[T]he origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was "business" or "personal" and hence whether or not it is deductible * * *

The court then went on to hold that the origin and nature of the warrant repurchase was a nondeductible capital transaction because (1) the transaction was effected in connection with, and in order to facilitate, a public offering of new securities of the taxpayer, and thus was in the nature of a recapitalization expense, and (2) since the corporation could have issued stock in lieu of bonds upon the exercise of the warrants, the retirement of the warrants was really an extinguishment of stock rights, also a capital transaction. The cases of Five Star and Smith, relied upon by the taxpayer, were held not to establish a general principle that a primary business purpose can convert into a deductible expense an expenditure which is a capital transaction in nature and origin. Estate of Meade v. Commissioner, 489 F.2d 161 (5th Cir. 1974), revg. a Memorandum Opinion of this Court, cert. denied, 419 U.S. 882 (1974). Five Star and Smith (both also Fifth Circuit cases) were limited to their

specific factual circumstances, in which the payments were made to save the businesses of the respective taxpayers.

Application of the principles emerging from the foregoing cases to the facts of the Harder Tree situation, we believe, requires us to reject petitioner's theory for the deductibility of the \$100,677.44 paid to Rogers. Petitioner contends that the repurchase of Rogers' stock was made "in order to insure the continued operation of the taxpayer's business" and, therefore, the case falls within the holdings of Five Star and Capitol Indemnity Insurance, supra. We cannot accept this argument. To begin with, we believe that the authoritative weight of these cases has been substantially diluted by such subsequent cases as H. and G. Industries and Jim Walter Corporation, which clearly confine the theoretical basis for the section 162 deduction to certain narrow factual situations of business survival. The facts in the instant case are not comparable to those in the cases relied upon. The continued presence of Rogers in the Harder enterprises was the result of a bad bargain which could be undone only at considerable expense. However, petitioner has not

demonstrated that the continuance of Harder Tree's contingent obligation to repurchase Rogers' stock was⁵ a threat to the very survival of Harder Tree. The elimination of Rogers' interest in Harder Tree (and in the future combined Harder companies) was not dictated by outside forces directly threatening Harder Tree's pest control business (as was the case in Capitol Indemnity Insurance and Five Star), but was motivated by the financial and corporate planning considerations of its majority owners.

Petitioner contends, alternatively, that to the extent that the amount paid to Rogers exceeds the fair market value of the stock transferred, such excess should be deemed additional compensation or termination pay. This argument is grounded on the theory that the principal motivation for the payment was the business necessity to terminate Rogers' employment, which termination triggered Harder Tree's obligation to repurchase his stock at the

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The fact that Harder Tree was able to and did pay Rogers over \$100,000 in cash, despite the advice of Mr. Harder's attorney to disclaim its obligation to do so, itself seriously undermines any argument that Rogers' potential right to force such a payment in the future constituted a threat to Harder Tree's survival.

inflated formula price. We do not believe that this view of things is supported by the facts. While it appears that the Cardinal operation, which was Rogers' primary responsibility, was not profitable, Mr. Harder's solution to this problem was not to fire Rogers and replace him with another manager, but to get rid of the Cardinal operation altogether. Thus, the "pay-off" of Rogers does not appear comparable to the typical termination pay granted in connection with the replacement of an employee in an ongoing business.

Given the factual background here, the payment to Rogers in connection with the termination of his employment with the Harder enterprises cannot be separated from the contemporaneous elimination of his equity interest in Harder Tree (and his prospective future interest in the combined Harder companies). In this connection it should be noted that there is nothing in the record to indicate that Rogers would have been paid anything with respect to the termination of his employment had he wished to retain his 22 shares of Harder Tree thereafter. To the

contrary, the record (most significantly, the memorandum to Mr. Harder from his accountant concerning the future merger of the Harder companies) indicates that the principal motivation for the payment to Rogers was to eliminate his minority position in Harder Tree and thereby facilitate the merger of the various Harder companies.

It is true, as it was in the cases of H. and G. Industries and Jim Walter Corporation, that the payment in the instant case was part of an arrangement which would relieve the corporation of an onerous contractual commitment. However, also as in those cases, the origin and nature of the payment was a capital transaction. United States v. Gilmore, supra. It appears from the facts, as we see them, that the principal reasons motivating the purchase of Rogers' stock were (1) to permit Harder Tree to be merged with the other Harder companies without having to give Rogers an interest in the merged entity by virtue of his 11 percent interest in Harder Tree, and (2) to eliminate Rogers' right to force the company to repurchase his stock in the future at ever increasing prices unrelated to the value of such stock, due to the faulty repurchase price formula. Essentially, the nature and purpose of the payment to Rogers was to eliminate his present and future interest in the Harder enterprises. Despite the unusual surrounding factual circumstances,

this amounted to a capital transaction. Jim Walter Corporation, supra.

Accordingly, we hold that no portion of the sum of \$100,677.44 paid to Rogers in 1967 represented an ordinary and necessary business expense under section 162. Such payment represented a capital transaction giving rise to no taxable gain or loss. Section 311(a). Jim Walter Corporation v. United States, supra, H. and G. Industries, Inc. v. Commissioner, supra.

Having so held, we now turn to the question of petitioner's liability under section 6901, as transferee, for the tax deficiencies of Harder Tree.

In December 1968 Harder Tree (along with Harder Jersey Pest Control, Inc., and Harder-Woodland Tree Experts Co., Inc.) was merged into petitioner, pursuant to the laws of the State of New York. In the "Joint Agreement of Merger and Certificate" executed by the merging parties, there is contained a provision, quoted in our Findings of Fact, which clearly and unequivocally provides for the assumption by petitioner, as the surviving corporation, of all liabilities of the merged corporations, including Harder Tree.

Where a statutory merger has occurred in which the transferee, as the surviving corporation, expressly or⁶ impliedly agrees to assume the liabilities of the merged corporation, the survivor is liable as a transferee at law, for the income tax liability of the merged corporation for periods prior to the transfer. See Texsun Supply Corporation, 17 T.C. 433 (1951); and Kaufmann Department Stores Securities Corp., 2 T.C. 656 (1943), affd. 144 F.2d 776⁷ (3d Cir. 1944). Nevertheless, petitioner maintains that respondent is required to establish that the value of the assets transferred is sufficient to satisfy the proposed deficiencies.

Section 6902(a) provides that in proceedings before this Court the burden of proof is on the respondent to show that a petitioner is liable as a transferee of property of a taxpayer.

6

The operation of state law may imply such an agreement. See Gator Oil Co., 66 T.C. 145, 158 (1976), and McKinney, Business Corporation Law, sec. 906(b)(3), p. 58.

7

See also Turnbull, Inc., T.C. Memo. 1963-335, supplemental opinion, 42 T.C. 582 (1964), affd. 373 F.2d 91 (5th Cir. 1967), cert. denied 389 U.S. 842 (1967).

In cases involving transferee liability at law as opposed to transferee liability in equity, however, it is unnecessary for respondent to establish the value of assets transferred to sustain his burden of proof. See American Equitable Assur. Co. of New York v. Helvering, 68 F.2d 46 (2d Cir. 1933), affg. 27 B.T.A. 247 (1932); and Kamen Soap Products Co. v. Commissioner, 230 F.2d 565 (2d Cir. 1956), affg. a Memorandum Opinion of this Court;⁸ compare, Elaine Yagoda, 39 T.C. 170 (1962), affd. 331 F.2d 485 (2d Cir. 1964), cert. denied 379 U.S. 842 (1964).

Therefore, we conclude that such burden has been satisfied by respondent in this case merely through the documents reflecting the merger of Harder Tree into petitioner and its assumption therein of Harder Tree's liabilities.

⁸

See also Turnbull, Inc., supra; Bos Lines, Inc., T.C. Memo. 1965-71, affd. 354 F.2d 830 (8th Cir. 1965); 9 Mertens, Law of Federal Income Taxation, sec. 53.08, ch. 53, p. 15 (1971).

Other than to allege that respondent has not met his burden of proof, petitioner has made no arguments to refute the seemingly clear authority of the above-cited cases. Accordingly, we hold that petitioner is liable, as transferee, for the income tax deficiencies of Harder Tree.

Decision will be
entered for the respondent.

UNITED STATES TAX COURT

HARDER SERVICES, INC. (FORMERLY:)
HARDER EXTERMINATION SERVICE, INC.),)

Petitioner,)

v.)

Docket No. 1867-74

COMMISSIONER OF INTERNAL REVENUE,)

Respondent.)

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED by and between the respondent and the above named petitioner, by their respective undersigned attorneys, that for the purposes of the above case the following facts shall be taken as true, subject to the right of either party to object to the admissibility of any such facts on the grounds of materiality or relevancy; and, without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated. It is further stipulated and agreed that all exhibits referred to herein are incorporated in this stipulation of facts and are made a part hereof.

1. Petitioner in this proceeding is Harder Services, Inc. (formerly: Harder Extermination Service, Inc.) and hereinafter sometimes referred to as "Harder", a corporation incorporated under the laws of the State of New York on March 1, 1932.

2. On December 18, 1968 Harder Jersey Pest Control, Inc., a New Jersey corporation incorporated on March 13, 1957, Harder-Woodland Tree Experts, Co. Inc., a New York corporation incorporated on June 22, 1966, and Harder Tree Service, Inc., a New York corporation incorporated on March 8, 1957, were merged into Harder Extermination Service, Inc. which subsequently changed its corporate name to Harder Services, Inc. Attached hereto as Exhibit 1-A is a Certificate of Merger of the above described merger.

3. Cardinal Maintenance Corp. (hereinafter referred to as Maintenance Corp.) was a corporation organized under the laws of the State of New York on May 13, 1963. As of July 31, 1964 the sole stockholder of Maintenance Corp. was Philip A. Rogers. On July 31, 1964, Maintenance Corp. was merged into Harder Tree Service, Inc. (hereinafter referred to as Tree) and the stock of Maintenance Corp. was cancelled. On the same date, 22 shares of Tree common stock were issued to Mr. Rogers. At the time of the acquisition of Maintenance Corp. and at all times involved in this proceeding, there were 200 shares of common stock issued and outstanding of Tree. Concurrent with the merger of Maintenance Corp. into Tree, Tree created a new wholly-owned subsidiary known as Cardinal

Maintenance, Inc. (hereinafter referred to as Cardinal).

The assets acquired in the afore-described merger (in which Maintenance Corp. was a party) were contributed as capital to the newly created subsidiary Cardinal. [Attached hereto and marked as Exhibit 2-B is an Agreement of Merger dated July 23, 1964. Attached hereto as Exhibit 3-C is the post closing trial balance, as of July 31, 1964 of Cardinal. Attached hereto as Exhibit 4-D is page 27 of the General Journal of Tree. Attached hereto as Exhibit 5-E is page 1 of the General Journal of Cardinal.]

4. Attached hereto and marked as Exhibit 6-F is a copy of a Certificate of Merger of Harder Tree Service Inc. and Cardinal Maingenance Corp. into Harder Tree Service Inc. under Section 904 of the Business Corporation Law dated July 23, 1964.

5. Attached hereto and marked as Exhibit 7-G is an Agreement between Harder Tree Service, Inc. and Cardinal Maintenance, Inc. dated July 31, 1964.

6. Attached hereto and marked as Exhibit 8-H is the Employment Covenant Contract between Harder Tree Service, Inc. and Philip A. Rogers dated July 31, 1964.

7. Attached hereto and marked as Exhibit 9-I is the Stock Option Agreement between Harder Tree Service Inc. and F. Kenneth Harder and Philip A. Rogers dated July 31, 1964.

8. Attached hereto and marked as Exhibit 10-J are the corporate minutes of special meetings of the Board of Directors of Tree beginning with July 23, 1964 through November 15, 1968.

9. Attached hereto and marked as Exhibit 11-K are the corporate minutes of Cardinal from July 31, 1964 through December 28, 1967.

10. Attached hereto and marked as Exhibit 12-L is a copy of a letter dated January 4, 1967 addressed to Mr. Philip A. Rogers from Tree.

11. Attached hereto and marked as Exhibit 13-M is a copy of a letter dated January 18, 1967 addressed to Mr. Philip A. Rogers from Tree.

12. Attached hereto and marked as Exhibit 14-N is a copy of a letter dated February 16, 1967 addressed to Mr. Philip A. Rogers from Tree.

13. Attached hereto and marked as Exhibit 15-O is a copy of a letter dated February 16, 1967 addressed to Mr. Philip A. Rogers from Cardinal.

14. Attached hereto and marked as Exhibit 16-P is a copy of a Memorandum of Closing, dated February 9, 1967, signed by Alfred A. Marra, attorney for Tree.

15. Attached hereto and marked as Exhibit 17-Q is a copy of a letter dated January 23, 1967, addressed to Tree from Brynes & Baker, Certified Public Accountants.

16. Attached hereto and marked as Exhibits 18-R, 19-S, 20-T, 21-U and 22-V are the U. S. Corporation Income Tax Returns (Forms 1120) for Harder Tree Service, Inc. for the years 1964, 1965, 1966, 1967 and 1968.

17. Attached hereto and marked as Exhibit 23-W is U.S. Corporation Income Tax Return (Form 1120) for Cardinal Maintenance Corp. for the period January 1, through July 31, 1964.

18. Attached hereto and marked as Exhibits 24-X, 25-Y, 26-Z and 27-AA are the U. S. Corporation Income Tax Returns (Forms 1120) for Cardinal Maintenance, Inc. for the years 1964, 1965, 1966 and 1967.

19. Attached hereto as Exhibit 28-BB is the Certificate of Dissolution of Cardinal.

20. As of the end of the year 1967, the books of account of Tree indicate a debit balance due from its wholly-owned subsidiary, Cardinal, in the aggregate amount of \$29,324.68. The inter-company account also indicates credits of \$22,281.98 as of the end of 1967. Accordingly, the balance due by Cardinal to Tree as of December 31, 1967 was \$7,042.70.

21. For accounting purposes Tree treated the payment of \$100,677.44 to Mr. Rogers in 1967 as an additional investment in Cardinal. Tree therefore determined that it made the following capital contributions to Cardinal:

August 1, 1964	\$ 1,000.00
October 31, 1964	1,843.16
February 28, 1967	<u>100,677.48</u>

Total amount treated as capital contributions in Cardinal on the books of Tree	\$103,520.60
--	--------------

Debt due from Cardinal to Tree as of December 31, 1967	<u>7,042.70</u>
--	-----------------

Total amount of investment and debt claimed to be an ordinary loss upon its becoming worthless by Tree in 1967	\$110,563.30
--	--------------

The foregoing is set forth solely for the purposes of indicating how Tree computed the amount of ordinary loss claimed on its corporate tax return for the year 1967 in the amount of \$110,563.30.

22. The U. S. Corporation Income Tax Return (Form 1120) of Tree, as filed, indicates that the taxpayer had a deficit for the year 1967 in the amount of \$108,670.13. By filing an application for tentative carry-back adjustment, the taxpayer applied a portion of the net operating loss for the year 1967 to the years 1964, 1965 and 1966 as follows:

Total Loss to be Carried Back or Forward -\$108,670.13

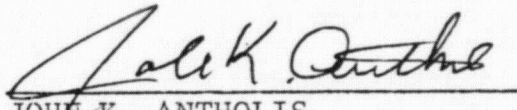
1964	\$12,992.65
1965	5,693.22
1966	28.27

Total Loss Carried Back	<u>18,714.14</u>
-------------------------	------------------

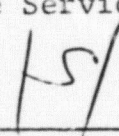
Balance of Net Operating Loss to be Carried Forward	\$ 89,955.99
--	--------------

23. The balance of the net operating loss for the taxable year 1967 of \$89,955.99 was carried forward to the taxable year 1968 by the taxpayer to the extent of \$28,424.32. The balance of the net operating loss carry forward as of December 31, 1968 from the taxable year 1967 was \$61,531.67. This amount was carried forward to the taxable years 1969 to 1972, inclusive. The Revenue Agent's Report dated January 28, 1972, sets forth a disallowance of net operating loss and net operating loss carry-overs and carry-backs for the years 1964 through 1968 to the extent of \$100,677.44 claimed as a

deduction by Tree on its tax return for the taxable year ended December 31, 1967. The amount disallowed was a part of the itemized amount of \$110,563.30 which was set forth on an attachment to the 1967 return and captioned "Explanation of Deductions" under "Item 26-Other Deductions" and which was specifically set forth as "Loss on Investment in and Advances to Cardinal Maintenance, Inc. - A Wholly-owned Subsidiary-Dissolved in 1967 \$110,563.30."


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MAY 14 1975

P R O C E E D I N G S

1
2 THE CLERK: Docket number 1867-74, Harder Services,
3 Inc., et al.

4 MR. ANTHOLIS: John K. Antholis for the Petition-
5 er.

6 MS. WESTEN: Marian L. Westen.

7 MR. KLETNICK: Theodore J. Kletnick for Respon-
8 dent.

9 MR. ANTHOLIS: Your Honor, my colleague, Alfred
10 Marra -- pardon?

11 THE REPORTER: Would you spell that name, please?

12 MR. ANTHOLIS: Alfred, A-l-f-r-e-d, Marra, M-a-
✓ 13 r-r-a. Isn't going to appear as a witness in this case,
14 but if the Court has no objection, would you mind if he sat
15 at the counsel table with me?

16 THE COURT: It's all right if he sits at counsel
17 table, but --

18 MR. ANTHOLIS: Well --

19 THE COURT: -- he can't participate. Right.
20 All right.

21 MR. ANTHOLIS: Your Honor, the parties have
22 executed a Stipulation of Fact with Exhibits 1A through
23 28BB included and I would like at this time to submit the
24 Stipulation of Fact and the attached exhibits to the Court
25 for its approval.

1 figure.

2 In 1966, it was proposed by Mr. Baker that for accounting
3 and tax reasons that the four or five Harder Companies be
4 amalgamated into one single entity. In reviewing the pro-
5 posed merger, they analyzed the problem of what they would
6 do with respect to Mr. Rogers and how they would give him
7 stock in this combined entity. Well, in going through that
8 analysis, they concluded number one, that they no longer
9 wanted to be in the -- in the office maintenance business.
10 Number two, that they found it was unprofitable. Number
11 three that they wanted to get rid of Mr. Rogers and terminate
12 his interest in the Harder companies and terminate his
13 relationship with the Harder companies as an officer and
14 director.

15 Evidence will be given that the Harders were given
16 advice by not only Mr. Baker but Mr. Alfred Marra, attorney
17 for the company at that time, that on reviewing the stock
18 option agreement which required, under the formula that's
19 there, a payment of \$100,677.44, that in the view of both
20 of them the amount was unconscionable, had no relation-
21 ship at all with the real value of the stock and both of
22 them advised the Harders that the payments should not be
23 made, and that some alternative approach to be taken to the
24 problems which is, ^{W.S. Jr} try to negotiate a new deal with Mr.
25 Rogers or ^{to} ^e pursuing the matter through the Courts. The

1 A Yes, sir.

2 Q -- Corporation?

3 A Yes, sir.

4 Q And during the course of your representation or
5 conferences with the -- with Frank Harder or F. Kenneth
6 Harder, and specifically prior to July 20, 1964, were you
7 shown any type of memoranda or agreements with respect to
8 the pending acquisition?

9 A I may have been. Now, I wouldn't care to say
10 specifically what, because it was a long time ago and as I
11 recall, at that time most of the work on the Harders were
12 being done by a very competent CPA and my employer by the
13 name of David Axelrod, so I am a little vague as to specific
14 documents I may have seen or that David had seen.

15 Q All right. Turning your attention to a date of
16 July 31, 1964, and I ask you whether or not you attended
17 a conference held or specifically a closing held at the
18 offices of -- or at the home of Mr. F. Kenneth Harder in
19 the basement. Did you attend that meeting?

20 A Yes, sir. I did.

21 Q And was that the meeting a closing agreement --
22 a closing of the transaction of the acquisition of Cardinal
23 Maintenance Corporation?

24 A It was.

25 Q And do you recall any of the people that were in

1 attendance?

2 A Mr. Rogers and his wife, the senior Mr. and Mrs.
3 Harder, Frank Harder, Mr. Wood -- Mark Wood, the treasurer,
4 Bob Felix, I believe was the vice-president of Harder Tree,
5 and myself and Mr. Valentine, I believe, the attorney.

6 Q Did -- were you during the course of that meeting,
7 were you asked or handed specific documents and asked to
8 review those documents?

9 A Not at --

10 Q Prior --

11 A -- that meeting that I recall, sir. No.

12 Q You weren't asked to --

13 A Not at that meeting, no.

14 Q -- you were not asked to review those documents
15 prior to their execution?

16 A I don't recall specifically reviewing any specific
17 document. I think at the meeting I saw the covenant -- the
18 employment covenant. But I'm reasonably certain I didn't
19 see the stock option agreement. The agreement for merger I
20 did see.

21 Q Mr. -- Mr. Baker, I show you the agreement of
22 merger dated July 23, 1964, Joint Exhibit 2B and ask you,
23 have you had an opportunity to review this document at or
24 prior to July 23, 1964?

25 A I believe I did look through this document before

1 meeting.

2 Q And at the time, were the attachments attached to
3 this document including what is known as Exhibit G of Joint
4 Exhibit 2B, captioned stock option agreement?

5 A As I recall, I simply saw the basic agreement of
6 merger with no appurtenances.

7 Q All right. And this --

8 A Simply to get the idea of what Valentine's plan
9 of merger was.

10 Q I see. But you weren't asked to review something
11 called stock option agreement?

12 A I don't recall having seen that until 1966.

13 Q All right. Again, I show you Joint Exhibit 9I,
14 which is known as the stock option agreement between Harder
15 Tree Services, Inc. and F. Kenneth Harder and Phillip A.
16 Rogers dated July 31, 1964, and I ask you at any time prior
17 to July 31, '64 or on that date, did -- were you asked to
18 review this document and pass on any information to the
19 Harders with respect to that document?

20 A To the best of my recollection, and remember this
21 is eleven years ago, to the best of my recollection, I never
22 saw this document until 1966.

23 Q All right. Mr. Baker, I show you three different
24 documents here, which are Joint Exhibits -- the first one,
25 captioned Cardinal Maintenance Corp., post closing trial

1 balance, July 31, 1964 which is Joint Exhibit 3C. Joint
2 Exhibit 4D, which is the general journal page of Harder
3 Tree, and particularly in that -- in Exhibit 4D I refer you
4 to the entry August 1st, merger account where there is a
5 debit and a credit of \$22,980.56, and then I show you general
6 journal page, Joint Exhibit 5E of Cardinal Maintenance, Inc.
7 on August 1, '64 which have certain debit and credit entries
8 which have totals of fifteen thousand -- it looks to me like
9 four thirty-four, seventy-eight, and I ask you whether you
10 can give us -- well, first of all, have you had an oppor-
11 tunity to examine these documents at or about or shortly
12 subsequent to the time that these entries were entered into
13 the books?

14 A Oh, yes. It was part of my supervision. These
15 were prepared -- this was prepared by Mr. Axelrod.

16 Q And Mr. Axelrod was under your supervision?

17 A He was under my supervision and I looked at this.

18 Q Fine. Now, what I'd like you explain to the
19 Court is this. What is the basic difference between these
20 \$22,980.56 totals which appear on the post closing trial
21 balance and -- and the general journal entry of Harder Tree
22 and the \$15,434.73 balances which appear in the general
23 journal of Cardinal Maintenance, Inc., the new corporation?

24 A Right. Now, it's really quite simple. In this
25 entry, which was prepared by Mr. Wood on the books of

1 Cardinal Maintenance, he picked up from Mr. Axelrod's post
2 closing trial balance all of the assets. Then he picked
3 up all the liabilities --

4 Q Cardinal Maintenance Corporation?

5 A Of the -- of the corporation --

6 Q Right.

7 A -- that went through this nonsense --

8 Q Right.

9 A -- with the mergers and so forth. They picked up
10 all the assets, they picked up all the liabilities on the
11 books of the Cardinal Maintenance Corp., there was an item
12 of goodwill, a debit, there was --

13 Q Could you read off the amount?

14 A \$9,200.00.

15 Q Yes.

16 A This is something that was presented to us by
17 Mr. Rogers. It was not audited by us, but this is what
18 appeared to be there. There is also a capital account of
19 \$6,800.00. So in order to bring this over onto the books
20 of Cardinal Maintenance, we had an excess of liabilities over
21 assets in the amount of some \$2,300.00 which was, of course,
22 the net between the capital account and the goodwill account
23 and because --

24 Q The treasury stock here of --

25 A \$9,200.00.

1 Q \$9,200.00.

2 A That's for \$6,800.00 some odd --

3 Q Less the \$6,876.00 nets out to \$2,331.24 which is
4 set forth as goodwill?

5 A Right.

6 Q In the general journal of Cardinal Maintenance,
7 Inc.?

8 A It is in effect a balancing figure. In other
9 words, they assumed that much more liabilities and assets --

10 Q Could you explain to the Court --

11 A -- presumed to be goodwill.

12 Q -- the difference between the equipment here which
13 is three thousand two thirty-eight, it looks like, fifteen --

14 A Right.

15 Q -- which appears in the general journal of Cardinal
16 Maintenance, Inc., Joint Exhibit 5E?

17 A Right. It appeared on the Cardinal Maintenance
18 post closing trial balance as the original cost of the
19 asset less the accumulated depreciation. When Mr. Wood put
20 this on the books, he netted the two.

21 Q He netted the two.

22 THE COURT: The bottom document is what exhibit
23 or is that --

24 MR. ANTHOLIS: This is a photocopy of the trial
25 balance, Your Honor. This is Joint Exhibit 3C.

1 THE COURT: All right.

2 MR. ANTHOLIS: Which was prepared by Mr. Axelrod
3 under the supervision of Mr. Baker.

4 THE COURT: Yes. That was for the record.

5 MR. ANTHOLIS: During the year 1966, Mr. Baker,
6 did you have occasion to advise Mr. F. Kenneth Harder and
7 Mr. Frank Harder with respect to certain accounting and tax
8 procedures?

9 A Yes, sir.

10 Q And did you give them certain advice with respect
11 to those matters?

12 A At that time I had come to the conclusion that
13 the administrative load of the great number of corporations
14 required some consolidation of them. The general ledgers,
15 the tax returns, the form 941's, the withholding certificates,
16 were simply weighing the company down with administrative
17 work. So I suggested they be put together, merged into
18 one, and we had considerable talks and I wrote memoranda and
19 so forth on ways that this might be done. At which time,
20 the question of the stock option agreement came up, and this
21 is why I'm reasonably certain that I had not seen it before
22 because I was completely sed at that time, that was
23 two years later, that such a document existed.

24 Q All right. So it was in -- during the year 1966
25 that you claimed that you first saw the stock option

1 agreement?

2 A To the best of my memory, it's the first time I
3 saw it and I couldn't believe that it existed when I saw it.

4 Q All right. And were you asked to review that
5 document at that time?

6 A I sure did, and was.

7 THE COURT: You say the first time you saw it was
8 in 19 --

9 THE WITNESS: '66 as far as I can recall, sir.

10 THE COURT: All right.

11 MR. ANTHOLIS: Your Honor, I would like to submit
12 Petitioner's Exhibit number 31 for identification.

13 THE COURT: Do you have others there or --

14 MR. ANTHOLIS: Yes.

15 THE COURT: Those are copies. I see. All right.
16 I thought you had --

17 MR. ANTHOLIS: Your Honor, this is the original
18 document. This one is stamped copy. It's identical.

19 THE COURT: All right.

20 MR. ANTHOLIS: This one is executed and whichever
21 you --

22 THE COURT: What are you having marked, the copy
23 then?

24 MR. ANTHOLIS: I'd like to have him mark the copy.

25 THE COURT: That's all right.

1 MR. ANTHOLIS: And to verify, this is the original.

2 THE CLERK: Your Honor, Petitioner's Exhibit 31
3 marked for identification.

4 MR. ANTHOLIS: Mr. Baker, I show you Petitioner's
5 Exhibit number 31 --

6 THE COURT: May I have the copy you have in your
7 hand?

8 MR. ANTHOLIS: Yes.

9 THE COURT: Thank you.

10 MR. ANTHOLIS: Which is a memorandum dated November
11 10, 1966 and ask you if you would identify this document,
12 please?

13 A Yes, sir. I prepared this document.

14 Q And did you prepare this at the request of Mr.
15 F. Kenneth Harder or Mr. Frank Harder?

16 A Well, it was incident to this whole discussion of
17 putting the companies together.

18 Q And the document is addressed to Mr. Frank Harder?

19 A Yes, it is.

20 Q All right. And does this document deal with the
21 problem of Mr. Rogers' stock in Harder Tree Service, Inc.?

22 A In paragraph two, if you'll notice it said that
23 in the course of our study our attention was called to a
24 stock option agreement and then I continue in that document
25 to point out the danger of the existence of that agreement

1 and the importance of vitiating it in some way.

2 Q Fine. I'd like to submit this into evidence at
3 this time.

4 THE COURT: Any objections?

5 MR. KLETNICK: We object, Your Honor. This -- as
6 we've been able to determine so far, this document relates
7 to a transaction that occurred in 1964 and number one, it's
8 after the fact, and number two, it contains statements of
9 the witness' opinion as to the transaction which is the
10 ultimate fact which is for the Court to decide. In other
11 words, the document speaks for itself.

12 MR. ANTHOLIS: Your Honor, this memorandum was
13 prepared by Mr. Baker in the course of advising the Harders
14 as to whether or not to consummate the transaction under
15 the stock option agreement and it certainly is relevant.

16 THE COURT: Yeah. Objection is overruled. It
17 is received in evidence. Mr. Clerk, you can return this
18 copy to --

19 MR. ANTHOLIS: Mr. Baker, in your analysis of --
20 during the course of your practice as a certified public
21 accountant, did you have occasion to deal with the problem
22 of valuing stock of closely held corporations?

23 A Yes, sir. Quite often.

24 Q And for what purposes?

25 A For state -- state tax valuation, for example,

1 or for public offerings of securities. Most notably that
2 and also in purchase and sales agreements.

3 Q Did -- during the course of that -- dealing with
4 those problems, did you ever take any courses of study on
5 valuation of stock?

6 A Not specifically. Just as part of my general
7 accounting education I had.

8 Q Did you ever have occasion to do any reading with
9 respect to the valuation of stock of closely held corpora-
10 tions?

11 A Oh, sure I have in accounting literature, yes.

12 Q How many times, would you say, you were called
13 upon to value stock in closely held corporations?

14 A Somewhere between ten and twenty times, I would
15 gather, over the years. At least.

16 Q During the year 1966 in the matter of preparing
17 an analysis of the stock option agreement dated July 31,
18 '64, did you form an opinion as to what value that stock
19 really had?

20 MR. KLETNICK: Objection, Your Honor.

21 THE COURT: Well, let him answer yes or no first.
22 And then he might answer no. I don't know.

23 THE WITNESS: Would you repeat that question?
24 I'm a little confused.

25 MR. ANTHOLIS: That's all right. I'll repeat it

1 myself.

2 A Yes.

3 Q During the year 1966, were you requested to analyze
4 the stock option agreement by either F. Kenneth Harder or
5 Frank Harder?

6 A Yes.

7 Q And in the course of that analysis, did -- do you --
8 were you requested to analyze what the value of the twenty-
9 two shares of Harder Tr. stock owned by Mr. Rogers at that
10 time really was?

11 A Now, let me be -- let me have some clarification
12 here. Do you mean what the valuation was based on the stock
13 option agreement or what my opinion of it was.

14 Q What the value of it was --

15 A Of the stock.

16 Q -- under your opinion.

17 A My opinion at that time --

18 THE COURT: Under the stock option, you mean, or
19 just --

20 MR. ANTHOLIS: No, not on the stock option.

21 THE COURT: All right.

22 MR. ANTHOLIS: I just wanted --

23 A As an individual.

24 THE COURT: All right.

25 MR. ANTHOLIS: Just answer the question, were you

1 asked to render an opinion --

2 A Yes, I was asked --

3 Q -- as to what the real value of that stock was?

4 A Yes, I was --

5 Q The true fair market value.

6 A -- asked, what do you think and I said, we would
7 start --

8 THE COURT: Wait a minute.

9 THE WITNESS: I'm a little confused.

10 THE COURT: You were asked to give your opinion --

11 THE WITNESS: Oh, yes.

12 THE COURT: All right.

13 MR. ANTHOLIS: Independent of the stock option
14 agreement.

15 A Independent of the stock option agreement.

16 Q Okay.

17 MR. KLETNICK: Respondent objects. This whole
18 line of testimony of the valuation is irrelevant and im-
19 material and there is no issue in this case as to valuation.
20 Furthermore, this witness has not been properly qualified
21 as an expert, and his testimony as to the valuation would
22 call for the testimony of an expert witness.

23 MR. ANTHOLIS: Your Honor --

24 THE COURT: The first objection I'll overrule..
25 The second objection regarding his qualifications --

1 MR. ANTHOLIS: All right.

2 THE COURT: -- you can address yourself to that.

3 MR. ANTHOLIS: First of all, Your Honor, I'm only
4 going to have Mr. Baker give this testimony not to establish
5 value. We will do that through another witness. But to
6 have him indicate that he gave certain advice to the Rogers
7 at that time based on the opinion that he formed and he was
8 qualified having dealt with the problem of stock in a closely
9 held corporation some dozen or twenty times before that.
10 He rendered certain advice to the Harders with respect to
11 the value of that stock.

12 THE COURT: Well, I don't think he can be classi-
13 fied as an expert, but I'll let him answer the question in
14 the first sense that you've phrased it. That is, he was
15 asked to tell Harder what it was worth. Well, I'd say that
16 he did tell them. He told them it was worth X dollars,
17 if that's what you want. But I don't think that this
18 gentleman is an expert on valuing stock.

19 THE WITNESS: I wouldn't claim to be a valuation
20 expert, no, sir.

21 MR. ANTHOLIS: Fine.

22 THE COURT: And if you did I wouldn't accept it.

23 MR. ANTHOLIS: Fine.

24 THE COURT: Right.

25 MR. ANTHOLIS: So we'll pursue this line of

1 questioning in order to show Mr. Baker's state of mind at
2 that time and the advice that he rendered. And did you form
3 an opinion at that time, Mr. Baker, as to what --

4 A Yes, sir.

5 Q -- what the value --

6 A I formed an opinion based on the facts that it was
7 a losing proposition.

8 Q And --

9 A And therefore --

10 Q -- and can you tell us the approximate value that
11 you set on that stock, the real fair market value?

12 A Well, what I had done in order to render some
13 sort of an opinion, I gave them a method of valuation that
14 I felt was fair as opposed to all kinds of formulas that I
15 mentioned in there. I did mention, of course, that I thought
16 that the stock option agreement was completely unfair. It
17 was not a viable type of agreement. So instead I said, let
18 us consider the possibility of a -- a price earnings ratio
19 as a means of determining the stock, and my opinion at the
20 time, strictly based upon the stock market situation and
21 so forth then was for that type of stock. I'm speaking now
22 of Harder Tree Service, a fifteen times annual earnings at
23 that time and that financial climate was probably a fair
24 enough valuation.

25 Q And what value did you come up with?

1 A I didn't come up with one because I didn't -- I
2 simply gave them a method that I thought was fair. Then if
3 they wanted that pursued, I would have pursued it, but I
4 don't recall --

5 Q Did you have --

6 A -- ever pursuing into dollar and cents.

7 Q -- did you have a particular amount in mind when
8 you said it was unfair? Did you think that the stock held
9 by Mr. Rogers was worth \$50,000.00?

10 A At that point I couldn't think it was worth --
11 well, practically nothing, to be perfectly frank --

12 Q Well, would you --

13 A -- with you.

14 Q -- or --

15 A The way the situation was going, I wouldn't have
16 given him anything for it myself.

17 Q Well, would it be less than \$50,000.00?

18 A Oh, definitely less.

19 Q Would it be less than \$25,000.00?

20 A I would not have given him --

21 MR. KLETNICK: Objection. Leading witness.

22 THE COURT: Yes. Don't lead the witness.

23 MR. ANTHOLIS: All right.

24 A No, I -- to be perfectly honest with you, we had a
25 failing profitless situation in Cardinal Maintenance. It was

1 dragging Harder Tree Service down. I certainly would not
2 have put much valuation particularly when there is not a
3 great deal in the way of equipment in Cardinal Maintenance,
4 worthless type of equipment, as was proved by the latest
5 sale. So that then I certainly wouldn't have put any con-
6 siderable valuation on it.

7 Q All right. Did you express to either F. Kenneth
8 Harder or Frank Harder your feelings other than the memorandum
9 of November 10, 1966 which is Petitioner's Exhibit number
10 30. Other than that memorandum, did you express to the
11 Harders your view with respect to the value and what they
12 should do with respect to the stock option agreement?

13 A As soon as I saw the stock option agreement and
14 realized what was involved in it, it was my opinion that they
15 had to do something to get rid of that stock option agree-
16 ment.

17 Q And what did you recommend?

18 A Well? I recommended, first of all, I recommended
19 negotiation. Because what it was doing, it was creating an
20 evergrowing contingent liability for that company and it was
21 certainly any talk that they had of going public, which there
22 was talk at that time of going public with the whole com-
23 bined ball of wax would be ruined by this evergrowing
24 contingent liability. So my opinion was that the first
25 thing they had to do was to sit Mr. Rogers down and negotiate.

1 Let us be reasonable about this thing. Failing that, that
2 they should then discharge him and let him sue and I at that
3 time brought in Mr. Marra of whom I held in high repute from
4 another client of mine, a mutual client of ours, and I
5 brought him in to see what he thought. And I felt very
6 strongly at that time that they had to terminate that agree-
7 ment somehow or another.

8 Q All right. Did the Harders follow your advice,
9 Mr. Baker?

10 A Well, they followed it to the extent that they
11 tried to negotiate.

12 Q And did --

13 A And that was fruitless.

14 Q And that was fruitless.

15 A They then followed it to the extent that they
16 brought in Mr. Marra.

17 Q And notwithstanding your advice, the stipulated
18 evidence indicates that payment was made of \$100,677.44.
19 Do you know why that payment was made?

20 A I think that they felt so strongly that that
21 thing had to be terminated and life go on without Rogers
22 that they were willing to make that payment to get rid of
23 him. Rather than take chances in litigation, carrying on
24 over a period of years with the situation growing worse.

25 Q I just have one more question, Mr. Baker. Going

1 back just a few steps, subsequent to your preparation of the
2 memorandum of November 10, 1966, Petitioner's Exhibit number
3 30, and subsequent to the advice that you gave to the
4 Harders with respect to the alternative courses that they
5 should pursue, were you asked to prepare a computation with
6 respect to the actual amounts that had to be paid pursuant
7 to the formula set forth in the stock option agreement?

8 A Yes, sir. I did.

9 Q And I show you Joint Exhibit Number 17Q and ask
10 you whether you prepared this exhibit?

11 A All right, sir.

12 Q In particular, this is the Joint Exhibit Number
13 17Q, a letter addressed to Harder Tree Service, Inc., January
14 23, 1967.

15 A Yes, I prepared it and signed it.

16 Q I have no further questions, Your Honor.

17 THE COURT: Any cross?

18 MR. KLETNICK: Yes, Your Honor.

19 CROSS EXAMINATION

20 BY MR. KLETNICK:

21 Q Excuse me. At the outset of your testimony, you
22 mentioned that David Axelrod, who you said was a CPA in
23 your office?

24 A Correct.

25 Q Could you elaborate on that? What --

1 corporation known as Harder Services, Inc.?

2 A I am.

3 Q And could you tell us --

4 THE COURT: Excuse me one minute. Why don't we
5 put a chair by that door and let some of the heat that's
6 out there, Bob.

7 THE WITNESS: Thank you very much.

8 THE COURT: Yeah. Put a chair by that door so
9 it will stay open. That might help.

10 THE WITNESS: How do you live in this?

11 THE COURT: I don't know. I guess the system is
12 a little haywire this morning.

13 THE WITNESS: Gee whiz!

14 THE COURT: You may proceed.

15 MR. ANTHOLIS: Thank you. Mr. Harder, could you
16 tell us in what capacity or how you are related to Harder
17 Services, Inc.?

18 A I'm the president -- I'm the Chairman of the Board
19 and chief executive officer.

20 Q You're not the president.

21 A No, I am not.

22 Q Could you give us -- how long have you been
23 connected with Harder Services, Inc.?

24 A Ever since it was incorporated. In fact, I forgot
25 the year we incorporated at this moment.

1 Q And prior to its incorporation, what was the
2 business of Harder Services, Inc.?

3 A Well, that was -- Harder Services, when it was
4 incorporated, made up a group of companies, Harder Extermin-
5 ation Service, Jersey -- Harder Jersey Pest Control, Harder
6 Woodland Tree Company in New Jersey and Harder Extermination,
7 yes. There may have been some --

8 Q Was Harder Tree Service one of --

9 A Harder Tree Service, yes.

10 Q And Harder Extermination Service, Inc., was that
11 the surviving company?

12 A Yes, it was. Until we merged all of them together.

13 Q Then you changed the name?

14 A Harder Services, Incorporated.

15 Q All right. Could you give us a brief history of
16 the Harder Companies going back to the time when you started
17 in business?

18 A I personally started the business as a salesman
19 for a company that was selling extermination material in
20 1922. That's fifty-three years ago. And in 1926, '28 I
21 think it was, we decided that we would incorporate and made
22 Harder Extermination Service in which my wife and I were
23 the owners of the stock. And later on, we set up a Harder
24 Tree Service, and after that we bought a small company in
25 New Jersey and made the Harder Woodland Corporation of it.

1 That's about the picture of it.

2 Q Could you describe to us the various types of
3 businesses that these different companies were engaged in.

4 A Harder Extermination Services speaks for itself.
5 That is is a pest control and termite work. Harder Tree
6 Service was set up because we found we were being asked to
7 spray trees and do work of that sort and we decided that we
8 would set up a separate corporation called the Tree Service,
9 and that's how that got started. And when the war -- the
10 Second World War was over, one of our men who had been with
11 me wanted to re-open offices in extermination work that we
12 had had in New Jersey and with which he had not been connec-
13 ted, and so we opened it up and organized a small corporation
14 over there and called that the Jersey -- Harder Jersey Ex-
15 termination -- Harder Jersey Pest Control. I have always
16 insisted that if I was going to have a corporation it was
17 going to have my name.

18 Q Mr. Harder, were you -- in connection with these
19 various companies, did you hold a position --

20 A Would you talk a little louder?

21 Q I said --

22 A I have a hearing problem and I'm not hearing you.

23 Q Okay. In connection with these various Harder
24 companies, did you hold a position as an officer or director
25 of these companies?

1 A I've been a director of each one, a president of
2 most, and I was the vice-president of the maintenance company,
3 of the Cardinal Maintenance and a director of all of them.

4 Q And as an officer and director of these companies,
5 did you have an intimate knowledge of the business operations
6 and the financial and administrative aspects of the busi-
7 nesses?

8 A I have very intimate knowledge of the administra-
9 tion and the operations, but the financial work is not my
10 department. I'm not an accountant.

11 Q And who did -- who took care of the financial
12 problems in the company?

13 A Well, we have a bookkeeper who is not with us
14 now and his name is Mark Wood. He was our accountant in
15 the office and we depended a great deal on him. Mr. Baker's
16 company, what was it, as our auditors.

17 Q During the years 1964 to 1968, were you an
18 officer and director of Harder Tree Service, Inc.?

19 A Yes.

20 Q During the years 1964 through 1968, were you
21 an officer and director of Cardinal Maintenance, Inc.?

22 A Yes.

23 Q And in what capacities did you serve?

24 A I was vice-president of Cardinal and a director.

25 Q Were you Chairman of the Board?

1 A I beg your pardon?

2 Q Were you Chairman of the Board of Directors?

3 A I was Chairman of the Board of all of our compan-
4 ies.

5 Q And who was the president of Cardinal Maintenance,
6 Inc.?

7 A Phillip Rogers.

8 Q Do you know a Mr. Richard Valentine?

9 A Yes.

10 Q Could you tell us how you first came to know
11 Mr. Valentine?

12 A Could I tell you what, sir?

13 Q Could you tell us how you came to know Mr.
14 Valentine?

15 A Mr. Valentine was the son of one of our very
16 close friends, Alfred Valentine in Long Island. We had
17 seen him grow up from being a little boy. He even sold
18 eggs from chickens. He hatched them in his father's
19 garage and we bought them from him and we rode horses to-
20 gether because I had a horse and kept it many years in his
21 father's barn. The whole family were horsey people and
22 we rode together and we took the children to the beach to-
23 gether and it was at one of those places that I originated
24 the idea of competition between the kids as to who could
25 spit the pits of watermelon seeds the farthest. He always

1 won.

2 Q What type of work did Mr. Valentine do?

3 A Beg pardon?

4 Q What type of work did Mr. Valentine do?

5 A Oh, he was -- he went to college and came out and
6 studied law and now he's a practicing lawyer.

7 Q And was there a time that he represented you?

8 A Yes, there was.

9 Q And when did that start?

10 A Early in the '60's.

11 Q And did he represent the Harder companies?

12 A In some small way, I believe.

13 Q Prior to July, 1964, Mr. Harder, how is it that
14 Harder Tree Service, Inc. had an interest or came to have
15 an interest in Cardinal Maintenance Corporation?

16 A We were having an experience with a great many
17 of our competitors who were being bought -- acquired in one
18 way or another by some of the conglomerate corporations in
19 the maintenance of buildings such as Kinney and Triangle
20 and two or three other big ones. And they were absorbing
21 these extermination companies like us so that they could
22 take care of the small contracts that they had in the
23 buildings. And that was our business. And it was my idea
24 that it would be -- rather than see the industry of the
25 pest control absorbed by large conglomerates and we lose our

1 identity entirely, it would be a very good investment to see
2 if we couldn't secure some small maintenance corporation
3 that was small enough for a small company like ours, and we
4 were one of the largest in pest control in this area. Still
5 are. So that we could put those two together and make a
6 company that would do maintenance work as well as extermina-
7 tion work and office buildings, industry, and institutions.
8 And in that way, why, we decided that we would look into a
9 situation of the Cardinal Company which was owned and con-
10 trolled by Phillip Rogers who had married Barbara Valentine,
11 Richard Valentine's younger sister. So we were very close
12 to the family all the way through.

13 Q And did you discuss this matter with your son,
14 Frank Harder?

15 A Always. Yes.

16 Q And did you -- did you ask Frank Harder, your son,
17 to look into this matter?

18 A Yes. I suggested to him that it might be a good
19 idea to go into that as a sound investment. And he said,
20 I'll look into it and see what Phil wants to do because we
21 were all very close anyway.

22 Q All right. Did Frank Harder, your son, report
23 back to you with respect to this matter at a later time?

24 A Yes. He said that they thought it would be a good
25 idea and he would see if his brother-in-law who was his

1 attorney could give him advice on it and work something out.

2 Q Mr. Valentine is the attorney you are talking
3 about?

4 A Yes.

5 Q And Mr. Valentine at that time also represented
6 your company?

7 A In many ways, yes.

8 Q And did he -- with respect to this particular
9 transaction, did Mr. Valenti represent your company?

10 A He came into the picture as the counsel for Phil
11 Rogers and worked everything out and finally he said, since
12 we were all so close, he said I might just as well repre-
13 sent both you and Phil --

14 Q And you --

15 A -- after all, we're all very close.

16 Q And you acquiesced in that?

17 A I certainly did.

18 Q You had no question in your mind about it?

19 A No. No, I trusted him implicitly.

20 Q Could you tell us, Mr. Harder, what the substance
21 of the transaction as presented to you by Frank was going to
22 be with respect to Harder Tree acquiring Cardinal Maintenance
23 Corp.?

24 A Yes. He said that there had been agreed -- excuse
25 me. I have to take a pill once in awhile when I'm under

1 pressure.

2 THE COURT: Would you like some water?

3 THE WITNESS: When you get to be pretty nearly
4 eighty, you have to be careful.

5 THE COURT: Do you want some water?

6 THE WITNESS: No, thank you. My son Frank told me
7 that it had been worked out that Phil Rogers would sell us
8 his company --

9 MS. WESTEN: Excuse me, Your Honor. I'm going to
10 object to this line of testimony because it represents the
11 son's testimony and that's hearsay.

12 MR. ANTHOLIS: Mr. Frank Harder is going to
13 appear in Court and will be cross examined with respect to
14 transaction in question, and we're only relating as to what --
15 the question only relates as to what information was given
16 to Mr. Harder upon which he proceeded with respect to this
17 transaction.

18 THE COURT: Well, why can't he testify that he had
19 certain information from so and so and that he did such and
20 such thereafter? Then you can avoid the hearsay.

21 MR. ANTHOLIS: Fine. Did you have certain infor-
22 mation made available to you with respect to the transaction
23 that was about to take place?

24 A I did.

25 Q And did that information include that Mr. Rogers

1 would become an officer of the new subsidiary of Harder Tree
2 to be known as Cardinal Maintenance, Inc.?

3 A It did.

4 MS. WESTEN: I'm going to object to that question,
5 Your Honor. It's leading the witness. It contains conclu-
6 sions. Again --

7 THE COURT: Yes. You can -- you can get to that
8 by saying after receiving that information what did you do,
9 and if he says, well, I had Rogers installed or something
10 like, I think -- I would think that's good enough.

11 MR. ANTHOLIS: All right. After you received in-
12 formation from Frank Harder with respect to the pending
13 transaction, did you seek advice of your counsel, Mr.
14 Valentine?

15 A Yes.

16 Q And what did you ask Mr. Valentine to do?

17 A Make up an agreement.

18 Q Make up the --

19 A The agreement of purchase of the company.

20 Q And what did you direct Mr. Valentine to do with
21 respect to how the transaction was to be consummated?

22 A With respect to who?

23 Q With respect to how the transaction was to be
24 structured, what did you direct Mr. Valentine to do? Did
25 you give him all the specific details?

1 A I had no details. The other people had to work
2 out the details. All I had was the idea of merging the two
3 companies, of our buying them. And I did not give him
4 instructions as to what details to put into such an agree-
5 ment.

6 Q Did you authorize him to -- or agree that Mr.
7 Rogers would become president of Cardinal Maintenance, Inc.?

8 A Yes.

9 Q Did you know that Mr. Rogers was going to receive
10 twenty-two shares out of two hundred shares of the Harder
11 Tree stock?

12 A Yes.

13 Q Mr. Harder, I show you exhibit -- Joint Exhibit
14 2B which is the agreement of merger and ask you, prior to
15 July 23, 1964 did you have an opportunity to review that
16 document?

17 A I did not. Not until after the 23rd or 24th.

18 Q But you signed -- did you sign this document?

19 A Yes.

20 Q On July 23 --

21 A I imagine I did. This is the one, isn't it? Yes.

22 Q And you signed it on July 23, 1964?

23 A Yes.

24 Q And did it have all of the attachments that are
25 attached to that agreement?

1 A I believe so, but I don't know what else -- there
2 may be some pages that had some alterations that had my
3 initial on them. I think so. I think it was all in there.

4 Q On July 23, 1964, did you sit down and read every
5 one of these pages in this document?

6 A Yes, sometime around there.

7 Q Did you fully understand these documents?

8 A I thought I did.

9 Q When did the merger of Cardinal Maintenance Corp.
10 into Harder Tree Service actually close? When was the
11 closing?

12 A Well, I think that date is the 31st of July so
13 that we could start the combined operation on the first of
14 August.

15 Q And did you attend that closing?

16 A I did.

17 Q And where was it held?

18 A In my private office in the basement of my home.

19 Q In Hempstead?

20 A In Hempstead.

21 Q And who was in attendance at that meeting?

22 A Besides myself and my wife, Phil Rogers and his
23 wife, Bob Felix, my son Frank was away, and Mr. Valentine
24 was there. The auditor was there too with our bookkeeper.

25 Q Mr. Baker and Mr. Wood?

1 A Yes. They were there. How long they stayed I
2 don't remember. But I know they were there for some time.

3 Q Mr. Harder, I show you Joint Exhibit 8H which is
4 the employment covenant agreement.

5 A Yes.

6 Q Executed by Mr. Robert Felix, vice-president, on
7 July 31, 1964 and ask you, were you present when this docu-
8 ment was executed?

9 A I don't -- what date?

10 Q July 31, 1964.

11 A Oh, yes. I was at that meeting.

12 Q And did Mr. Felix execute this document at your
13 direction?

14 A Yes.

15 Q I show you the Joint Exhibit 9I which is a stock
16 option between Harder Service, Inc., F. Kenneth Harder and
17 Phillip Rogers and ask you, did you execute this document?

18 A Yes. I see my name there. That's my signature.

19 Q And Mr. Felix executed this document at your
20 direction?

21 A Yes.

22 Q For Harder Tree Service, Inc.?

23 A Yes.

24 Q At or prior to the closing on July 31, 1964 did
25 you review and read all of these documents?

1 A I did.

2 Q Specifically Exhibits 8H and 9I?

3 A I did.

4 Q Did you ask Mr. Wood or Mr. Baker or Mr. Felix to
5 review those documents at or prior to that date?

6 A I thought I had. Whether they read them or examined
7 them or not, I never did know.

8 Q Did they give you any advice with respect to those
9 documents at that time?

10 A I don't know.

11 Q Mr. Harder, I show you Joint Exhibit 9I and par-
12 ticularly refer you to paragraph five therein which talks
13 about the option price which states -- off the record, Your
14 Honor.

15 (Off the record.)

16 Q Which states, "option price, the option price re-
17 ferred to in sections one and three hereof shall be an amount
18 in dollars determined by multiplying the value of all the
19 outstanding stock of Tree Service by a fraction of which the
20 numerator is the number of shares being sold and the denominator
21 is the total number of shares of stock of Tree Service out-
22 standing on the last day of the calendar month immediately
23 preceding the month in which the right to exercise the option
24 arose. The value of all the outstanding stock of Tree
25 Service shall be an amount equal to the average annual

1 gross receipts of Tree Service and all its subsidiaries
2 consolidated for twenty-four calendar months ending on the
3 last day of the calendar month immediately preceding the
4 month in which the right to exercise the option arose ex-
5 cept that if the right to exercise the option arises on or
6 before August 1, '67, such value shall be in amount equal
7 to the annual gross receipts of Tree Service and all its
8 subsidiaries consolidated for the twelve months -- twelve
9 calendar months ending on the last day of the calendar month
10 immediately preceding the month in which the right to
11 exercise arose. Such receipts shall be computed in accord-
12 ance with the accrual method of accounting and shall include
13 the receipts of any business required by Tree Service for
14 stock of Tree Service."

15 Now, I ask you, did you read this particular paragraph
16 when you reviewed the documents at or prior to July 31,
17 1964?

18 A I did.

19 Q Did you understand the meaning of that paragraph?

20 A As I said before, I thought I understood them.

21 Q And what did you think that particular paragraph
22 meant at that time?

23 A That it was a small corporation and that it had
24 no great prospects of a huge success. It was all right and
25 Valentine thought that it was a wise thing to make the

1 contract up in that way. He was my attorney and I was
2 agreeing to it..

3 Q Did you analyze and realize what the full impli-
4 cations of that formula meant at that time?

5 A I did not.

6 Q Did you have in your mind any thought of the
7 value of the stock that was being acquired?

8 A No, I did not.

9 Q Did you have any thought in your mind as to what
10 you would have to pay to Mr. Rogers to re-acquire the
11 shares of stock that he was receiving?

12 A Only that it would be somewhere around ten or
13 fifteen or twenty thousand dollars.

14 Q Mr. Harder, when did you first realize the full
15 impact of the formula of paragraph five of the stock option
16 agreement?

17 A At the time that we first began to discuss the
18 merger of all our corporations.

19 Q And what year was that?

20 A '68, I believe. When Mr. Baker was given the job,
21 really, the chore of deciding how we could put our corpora-
22 tions all together and merge them into one, and after some
23 study he came back to us and he said to me, you have a
24 problem in the matter of stock option in this Cardinal
25 outfit. And that was when I had a chance to really get the

1 impact of what that paragraph meant.

2 Q Was that in 1966?

3 A I think it was, yes. Two years, yes. After the
4 company -- after we bought the company. It was two years
5 later.

6 Q And you were considering this matter with respect
7 to merging all the companies together? And you --

8 A We were considering it.

9 Q All right. And did you analyze the operation
10 of Cardinal Maintenance, Inc. at that time?

11 A Yes.

12 Q And what did you conclude?

13 A I concluded that with the obligation that we were
14 acquiring to pay him \$100,000.00, there or thereabouts, was
15 exorbitant and in my estimation was burglary but there was
16 nothing else to do. Therefore we were going to merge it.
17 So we gave up the merger for the time being until we could
18 dispense with the Cardinal operation entirely. It was
19 -- tying up our capital so completely that we couldn't --
20 we were having difficulty financing our other business, so
21 we had to just do one of the two, either merge them all or
22 do away with the Cardinal Company.

23 Q Was the Cardinal Company a profitable company?

24 A No, it was not. I don't know how many hundred
25 thousand dollars that they had done in business. It was

1 either six hundred or eight hundred thousand and it made
2 four hundred dollars. And I said to --

3 Q \$400.00?

4 A \$400.00. And I had said to my vice-president, get
5 rid of this before Labor Day.

6 Q You stated that you consulted with Mr. Baker and
7 he prepared a memorandum. Did he give you advice with
8 respect to whether or not you should make the payment to
9 Mr. Rogers?

10 A Yes, he did.

11 Q And what was that advice?

12 A If you've got a bad deal, you'd better go to
13 Court and fight it.

14 Q Did he advise you first to try to negotiate with
15 Mr. Rogers?

16 A Yes, he did.

17 Q And did you speak to Mr. Rogers about --

18 A No, I did not. My son did.

19 Q Did you speak to Mr. Valentine about this matter?

20 A I did not. My son did.

21 Q Mr. Harder, do you know Alfred Marra?

22 A Yes.

23 Q And how long have you known him?

24 A Since about that time, early in the '60's.

25 Q And who is he?

1 A He's an attorney, works for me, and he sits right
2 beside you.

3 Q All right. And did he consult you during that
4 period with respect to the prospective mergers --

5 A Yes.

6 Q -- of your companies?

7 A Yes. He did.

8 Q Did he also have an opportunity to analyze the
9 stock option agreement?

10 A Yes, he did.

11 Q And did he give you some advice with respect to
12 that stock option agreement?

13 A Yes, he did.

14 Q And what was that advice?

15 A Fight it. Take it right to Court.

16 Q On what basis?

17 A On the basis that it was an exorbitant and un-
18 conscionable thing and should never have been signed, of
19 which I felt ashamed, and --

20 MS. WESTEN: I'm going to object, Your Honor,
21 to this line of testimony on the ground that it expresses
22 opinions and it's hearsay. I understand Mr. Marra is in
23 the Courtroom. He can speak for himself.

24 MR. ANTHOLIS: He's certainly capable of --

25 THE COURT: I'll overrule the objection. Proceed.

1 MR. ANTHOLIS: Mr. Harder, you testified that you
2 were given advice by Mr. Baker that you should fight this
3 thing in the Courts and that you were given similar advice
4 by Mr. Marra.

5 A Yes.

6 Q To fight this thing in Court.

7 A Yes.

8 Q The record indicates that you made -- that Harder
9 Tree Service, Inc. actually made a payment of \$100,677.44
10 to Mr. Rogers.

11 A I did.

12 Q Why did you make that payment?

13 A We simply had to get rid of the corporation. It
14 was a losing proposition and I could not fight the Valentine
15 family in the Courts, because that would take years and
16 years and we would have wound up out of business.

17 Q Could you have purchased the stock back from Mr.
18 Rogers and have Mr. Rogers continue as an officer and direc-
19 tor of Cardinal Maintenance?

20 A No. That was not in the contract. The contract
21 stated that if Mr. Rogers were to leave our employ, the
22 stock was to be purchased by us as an option, and if -- and
23 there was no item in the contract that would give him the
24 right -- or give me the right to buy the stock back from
25 him while he was in our employ.

1 Q Did you want him to continue in the employment
2 of Harder Tree Service or of --

3 A No.

4 Q -- Cardinal Maintenance, Inc.?

5 A No.

6 Q Did you intend that the payment that you were
7 making was in full payment of the stock you were to
8 acquire of Harder Tree Service, Inc. from Mr. Rogers?

9 MS. WESTEN: I'm going to object.

10 THE WITNESS: Yes, I found out that it had to be
11 by the contract to full payment.

12 MR. ANTHOLIS: And was the payment made for any
13 other purpose?

14 A Just to get rid of him and the corporation.

15 MS. WESTEN: I'm going to object. There is
16 evidence in the record which indicates that the payment
17 was made pursuant to the terms of the stock option agree-
18 ment and whatever -- and that's a bilateral agreement and
19 Mr. Harder's unilateral intention is not an issue in this
20 case.

21 THE COURT: Yes.

22 MR. ANTHOLIS: I think it's totally relevant and
23 significant.

24 THE COURT: The objection is overruled.

25 MR. ANTHOLIS: I have no further questions of Mr.

1 THE CLERK: Raise your right hand, please. You
2 do solemnly swear that the testimony you are about to give
3 the Court in this case shall be the truth, the whole truth
4 and nothing but the truth, so help you God?

5 THE WITNESS: I do.

6 THE CLERK: Be seated and state your full name and
7 address for the record, please.

8 THE WITNESS: Frank A. Harder, 156 Brompton Road,
9 Garden City, New York.

10 THE REPORTER: Would you spell Brompton?

11 THE WITNESS: B-r-o-m-p-t-o-n.

12 FRANK A. HARDER,
13 called as a witness, having been duly sworn, took the stand
14 and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. ANTHOLIS:

17 Q Mr. Harder, could you tell us where you are
18 presently employed?

19 A I am the president of Harder Services, Inc.

20 Q And how long have you been connected with that
21 company?

22 A Since I graduated from college in 1951.

23 Q During the year 1964, do you recall -- strike
24 that. During the years 1964 to '68, were you also an
25 officer and director of Harder Tree Service, Inc.?

1 A Yes.

2 Q Were you also an officer and director of Cardinal
3 Maintenance, Inc.?

4 A Yes.

5 Q All right. During the summer or early spring of
6 1964, do you recall the conversation that you had with
7 your father, F. Kenneth Harder with respect to the possible
8 acquisition of an office maintenance company?

9 A Yes.

10 Q And could you tell us what the substance of that
11 conversation was?

12 A My father brought up the idea of our possibly
13 purchasing or entering into some type of agreement with
14 an office cleaning contracting firm and we found that a
15 number of the bigger organizations were buying up pest
16 control and tree businesses and other service businesses.
17 At that particular point I suggested that we talk to Phil
18 Rogers who had Cardinal Maintenance. He cleaned our own
19 office building and I had known him for many years as my
20 father had.

21 Q And did you speak to Phil Rogers?

22 A I did.

23 Q And what was the substance of that conversation?

24 A He would be delighted to become associated with
25 our company.

1 Q And did you work on the details of the exchange
2 of -- I mean of the merger with him -- Mr. Rogers?

3 A Yes, I discussed it with both Phil Rogers and with
4 Dick Valentine who was -- who I had known all my life and
5 was Phil's brother-in-law and his attorney and at that
6 particular point he said, well, I'll represent both.

7 Q And how did -- how was the determination made
8 as to the number of shares of Harder Tree Service, Inc. that
9 Mr. Rogers would receive?

10 A Well, this was worked out between our accoun-
11 tant, Keith Baker, and Mr. Valentine and it worked out to
12 be approximately \$9,200.00 with the value set on them, the
13 value of the Cardinal operation. And this became worth
14 twenty-two shares of Harder Tree Stock.

15 Q And after that determination was made -- added,
16 how did your company proceed with respect to consummating
17 this transaction?

18 A Well, we told Valentine to -- I told Valentine to
19 draw up the necessary papers.

20 Q And he was representing Harder Tree Service at
21 the time?

22 A Yes.

23 Q And he also was representing Cardinal Maintenance
24 Corporation at the time?

25 A Yes.

1 Q And he prepared these documents?

2 A He did.

3 Q Mr. Harder, I show you the agreement of merger,
4 Joint Exhibit 2B dated July 23, 1964, and -- which indicates
5 your signature. Is that correct?

6 A That's correct.

7 Q As president of Harder Tree Service, Inc.?

8 A Correct.

9 Q Prior to that date, did you have an opportunity
10 to examine this document?

11 A No.

12 Q The document was -- the first time you saw the
13 document was on the date that it was executed?

14 A Yes.

15 Q That date before you signed this document, did
16 you have an opportunity to look at the -- at an attachment
17 or a draft of an attachment called the stock option agree-
18 ment?

19 A Yes.

20 Q And did you read it carefully?

21 A Not carefully. I read it.

22 Q Did you -- I particularly draw your attention to
23 paragraph five which is captioned option price, and which I
24 read into the record earlier, and ask you to look at it and
25 after you have read it I'd like to ask you a question.

1 A All right.

2 Q All right. On July 23, 1964, when you executed
3 the agreement of merger and either the agreement or the
4 draft of the agreement was attached thereto, did you read
5 this paragraph five at that time?

6 A I believe so..

7 Q Did you realize at the time the full impact of
8 that paragraph?

9 A No.

10 Q What in your view at that time did you deem stock
11 option agreement to mean?

12 A We thought that if at any time it might have to
13 be exercised that it would be an average so that if in the
14 future we had to purchase that stock if he died or anything
15 it would be probably worth -- it was worth \$9,200.00 when
16 we signed, it would probably be worth maybe ten or twelve
17 thousand dollars at some future date.

18 Q Mr. Harder, do you have any idea how that \$9,200.00
19 figure was arrived at?

20 A Basically.

21 Q Would you describe that to the Court?

22 A It was derived from the value of the contracts
23 that the Cardinal Maintenance Corporation had. They had
24 monthly contracts for cleaning various office buildings and
25 that plus the value -- depreciated value at that time of

1 the equipment that they had, scrubbers and waxing --

2 Q And what was the average monthly contracts that
3 Cardinal had at the time?

4 A I believe it was somewhere around \$7,000.00 a
5 month.

6 Q Now, that's the average monthly amount, not the
7 average annual amount, right?

8 A Monthly, right.

9 Q Mr. Harder, when did you first realize the full
10 impact of the stock option agreement?

11 A In the fall of 1966 when we discussed the possi-
12 bility of merging our corporations into one and Mr. Baker
13 brought the full impact to mind.

14 Q And did you participate in the decision or the
15 process for making a decision to pay Phil Rogers \$100,677.44?

16 A I did.

17 Q And did you at that time -- did you think that
18 you were making a payment in full for the stock or for
19 any other purpose to Mr. Rogers?

20 MS. WESTEN: Objection, Your Honor. It calls for
21 the witness' opinion and his unilateral intention again,
22 and that's not an issue in this case.

23 MR. ANTHOLIS: Well, it's totally relevant, Your
24 Honor, to what he thought he was doing at the time.

25 THE COURT: Yes, I'll permit it. Overruled.

1 THE WITNESS: It was my intent to get rid of
2 him and to be honest with you, the stock had no meaning to
3 me at that particular point. All I wanted to do was get
4 rid of Rogers, right then and there because no matter what
5 the cost he had to go.

6 MR. ANTHOLIS: Did you receive advice from Mr.
7 Baker and Mr. Marra with respect to how you should proceed?

8 A I did.

9 Q And what was that advice?

10 A They said go to Court and fight him.

11 Q And why didn't you follow that advice?

12 A Well, for both family, personal and financial
13 reasons. The Valentine family could buy and sell us in a
14 minute, they'd have dragged us through the Courts for years,
15 and it could have cost us a fortune, and we might have lost
16 our business. It was better to cut the cards right then and
17 there, pay him, and get away from him fast.

18 Q Did you think that the payment you were making
19 was far in excess of the value of that stock that you were
20 going to acquire?

21 A Certainly I did.

22 Q I have no further questions.

23 THE COURT: You may cross examination.

24 MR. KLETNICK: We've no cross examination, Your
25 Honor.

1 THE COURT: Thank you. You may step down, Mr.
2 Harder.

3 (Witness excused.)

4 MR. ANTHOLIS: Your Honor, may I approach the
5 bench for a moment, please?

6 THE COURT: Yes. Counsel? Off the record.

7 (Off the record.)

8 MR. ANTHOLIS: Your Honor, I'd like to recall Mr.
9 F. Kenneth Harder to continue with his testimony.

10 THE COURT: Yes. You are still under oath, Mr.
11 Harder.

12 F. KENNETH HARDER,
13 recalled as a witness, having been previously duly sworn,
14 resumed the stand and testified further as follows:

15 REDIRECT EXAMINATION

16 BY MR. ANTHOLIS:

17 THE WITNESS: I'm an old grand jury man.

18 MR. ANTHOLIS: I'd like to have this volume marked
19 for identification.

20 THE COURT: It may be marked. How do you keep
21 so spry at your age?

22 THE WITNESS: They all ask me that. I don't know.
23 I guess I live right. Everything in moderation.

24 THE COURT: Just stay thin and you'll keep spry.

25 THE WITNESS: I lost forty pounds in the hospital

1 a year ago or two years ago. And I gained it all back with
2 my wife's cooking.

3 THE CLERK: Your Honor, Petitioner's Exhibit 32
4 is marked for identification.

5 THE COURT: All right. You may proceed.

6 MR. ANTHOLIS: Mr. Harder, I show you Petitioner's
7 Exhibit for identification number 32 which is a bound
8 volume captioned Harder Tree Service, Inc., merger of
9 Cardinal Maintenance Corp. into Harder Tree Service, Inc.
10 and transfer of assets, July 31, 1964, Harder Tree Service,
11 Inc., and ask you if you have seen this volume before?

12 A Oh, yes

13 Q And did you bring this to Court with you today?

14 A Yes.

15 Q And where did it come from?

16 A Mr. Valentine presented it to us about three weeks
17 after the closing on the merger -- on the purchase of the
18 Cardinal Company.

19 Q And since that time, where did you keep this?

20 A In my lock file in the basement of my home.

21 Q I'd like to submit this into evidence, Your Honor.

22 MS. WESTEN: Your Honor, Respondent objects to
23 the submission of that document into evidence. It is not
24 a business record. It contains unexecuted copies of docu-
25 ments, not originals, it contains opinions of witnesses not

1 before the Court for which there is no adequate evidentiary
2 foundation in the record and it's a hearsay document.

3 MR. ANTHOLIS: This was a document that was pre-
4 sented to Mr. Harder who executed some of these documents.
5 After the closing of the transaction on July 31, 1964, it
6 was part of the business records of Harder Tree Service,
7 Inc., and I would certainly think it's relevant to the
8 issue in dispute in this proceeding.

9 MS. WESTEN: Well, it's not a business record in
10 the evidentiary sense of the term business record, which is
11 a record kept in the ordinary course of business and there
12 is no testimony as to who prepared it or how it was pre-
13 pared or the source of some of the documents that are contained
14 therein or the basis for those documents.

15 THE COURT: That objection is a valid one. There's
16 no foundation for the document.

17 MR. ANTHOLIS: Well, let me ask a few more
18 questions here. Mr. Harder, I show you item ten in this
19 bound volume -- before I get into the question, may I ex-
20 plain something to the Court? This volume contains a
21 summary of the documents which were executed either on
22 July 23 or July 31 and I would say that of the eighteen
23 items that are here, approximately fourteen have already
24 been stipulated to and are in the record in evidence. The
25 only items here that have not been stipulated to and have

1 entered into the records are a copy of the minutes of the
2 Board of Directors of Cardinal Maintenance Corp. and -- which
3 is item number six and item number seven, consent of sole
4 stockholder of Cardinal Maintenance Corp. of the meeting
5 of July 23, which authorized the merger, and items number
6 ten and seventeen which are -- which I will direct my ques-
7 tions to specifically. So as far as the other items that
8 are listed here, that is, items one through ten and items
9 twelve through sixteen and item eighteen, I'm not concerned
10 as to whether or not -- petitioner is not concerned as to
11 whether or not they are admitted into evidence because they
12 are already there.

13 THE COURT: All right. Then you are only offer-
14 ing it for the purpose of items eleven, seventeen --

15 MR. ANTHOLIS: Eleven and seventeen.

16 THE COURT: And eleven are minutes?

17 MR. ANTHOLIS: Well, no.

18 THE COURT: What is eleven then?

19 MR. ANTHOLIS: Item eleven --

20 THE COURT: You're offering it for eleven and
21 seventeen?

22 MR. ANTHOLIS: Eleven and seventeen.

23 THE COURT: All right. What's eleven and what's
24 seventeen?

25 MR. ANTHOLIS: Item eleven is a statement signed

1 by Mr. Rogers on July 31, 1964 where it states that the
2 undersigned hereby certifies that the value of twenty-two
3 shares of common stock of Harder Tree Service and New York
4 Corporation issued on July 31, 1964 is \$9,200.00 dated
5 July 31, '64.

6 MS. WESTEN: Respondent objects to any testimony
7 of this witness with respect to that document which was
8 signed by Mr. Rogers. Mr. Rogers is not in the Courtroom
9 and he cannot be cross examined as to the basis of that
10 statement and there is no issue in this case related to
11 the valuation of stock.

12 MR. ANTHOLIS: I haven't asked my questions before
13 the objection was made.

14 THE COURT: Well --

15 MR. ANTHOLIS: I haven't asked the questions.
16 What I was going to ask is whether Mr. Harder --

17 THE COURT: You are --

18 MR. ANTHOLIS: -- saw this executed or whether
19 or not it was presented to him at the time of the closing.

20 THE COURT: He's already answered that.

21 THE WITNESS: It was.

22 THE COURT: Yeah.

23 THE WITNESS: It was.

24 THE COURT: He said it's been presented to him.

25 Yes.

1 MR. ANTHOLIS: Okay. Now, why wouldn't that be
2 admissible as part of the business records of Harder Tree
3 Service when it was received?

4 THE COURT: Well, it was an objection on the basis
5 that there is a statement in there by a gentleman who is
6 not before the Court regarding the value of stock.

7 MR. ANTHOLIS: All right. Now, the value of the
8 stock, as far as Mr. Rogers is concerned, I'm not con-
9 cerned about what his views were. The fact of the matter
10 is that this witness testified that in his mind the stock
11 had a value of nine or ten thousand dollars.

12 THE COURT: Well, if he's saying that --

13 MR. ANTHOLIS: And this --

14 THE COURT: Wait a minute. Wait a minute, now.
15 Let me get my thoughts in the record.

16 MR. ANTHOLIS: Okay.

17 THE COURT: You've been talking for a long while.
18 If he wants to state that part of his reasoning regarding
19 the value of the stock was based on that statement, fine.

20 MR. ANTHOLIS: That's precisely what I want to
21 bring up.

22 THE COURT: Then I'll permit that.

23 MR. ANTHOLIS: Fine. Mr. Harder, was part of
24 your reasoning as to what the value of the stock that you
25 were giving up in Harder Tree Service, Inc. based on this

1 statement, item number ten and items number seventeen and
2 incidentally, item number seventeen talks about a similar
3 value, \$9,200.00 of the hundred shares of Cardinal Mainten-
4 ance Corp. which was to be merged and all of the outstanding
5 shares of Cardinal Maintenance Corp. would be merged into
6 Tree, from a similar value, \$9,200.00. Was part of your
7 reasoning that this stock was -- that's what the stock was
8 worth at that time based on these statements --

9 A It was.

10 Q -- that were signed by Mr. Rogers?

11 A It was.

12 Q And were these statements signed by Mr. Rogers
13 in your presence?

14 A I think they were at that meeting, yes. Yes,
15 because the only things that came in this book were the
16 minutes of all parties to that conference in my office.

17 Q Which you hadn't seen before?

18 A Which I hadn't seen before.

19 THE COURT: All right. I'm receiving it for
20 that purpose.

21 MR. ANTHOLIS: I have no further questions and
22 request the Court that if it is going to be admitted into
23 evidence, can I make copies --

24 THE COURT: You may withdraw it and substitute
25 photostatic copies. I assume you have no objection to that,

1 Ms. Westen?

2 MS. WESTEN: Well, there are copies in the book,
3 so it would be photostatic copies of photostatic copies.

4 THE COURT: Yes.

5 MS. WESTEN: And we object to it on that ground
6 as well.

7 THE COURT: Well, then, there's an objection so
8 you will have to leave the book in evidence.

9 MR. ANTHOLIS: You object?

10 MS. WESTEN: I object to the submission of photo-
11 static copies of photostatic copies into evidence, yes.

12 THE COURT: The volume is received in evidence.

13 RECROSS EXAMINATION

14 BY MS. WESTEN:

15 Q Mr. Harder, do you have personal knowledge of
16 the basis for Mr. Rogers' opinion in that case?

17 A I did not audit his books.

18 Q And you don't know -- you don't know the docu-
19 mentary basis or even if the documentary basis for the
20 conclusions that Mr. Rogers drew existed with respect to
21 those documents?

22 A The only thing I had to go by was the assurance
23 of my son who had seen the figures and Mr. Baker who had
24 reviewed them.

25 Q But you don't -- you don't know the basis for

1 Mr. Rogers' statement contained in those documents?

2 A Not being a bookkeeper and an accountant, I could
3 not have gone through all of his books to determine those
4 things. That's not my end of the business.

5 Q Respondent further objects to the admission of
6 those documents into evidence on the ground that there is
7 no evidentiary foundation for the opinions contained.

8 THE COURT: Overruled.

9 MR. ANTHOLIS: I have no further questions of Mr.
10 Harder. Thank you.

11 THE COURT: You may step down, Mr. Harder.

12 MR. ANTHOLIS: Your Honor, we have two more wit-
13 nesses. Would you like us to proceed to conclusion or --

14 THE COURT: How long are you going to take?

15 MR. ANTHOLIS: Both witnesses? About an hour.

16 THE COURT: Do you have any objection?

17 MS. WESTEN: The respondent has no objection.

18 MR. KLETNICK: Whatever the Court wants to do.

19 THE COURT: Fine.

20 MR. ANTHOLIS: I'd like to call --

21 THE COURT: If that's agreeable with everybody,
22 it's agreeable with the Court.

23 MR. ANTHOLIS: Fine. I'd like to call at this
24 time Mr. Alfred A. Marra.

25 THE CLERK: You do solemnly swear that the testimony

1 you are about to give the Court in this case shall be the
2 truth, the whole truth, and nothing but the truth, so help
3 you God?

4 THE WITNESS: I do.

5 THE CLERK: Be seated. State your full name and
6 address for the record.

7 THE WITNESS: Alfred A. Marra, 57 Vanderbilt Road,
8 Manhasset, New York.

9 ALFRED A. MARRA,
10 called as a witness, having been duly sworn, took the stand
11 and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. ANTHOLIS:

14 Q Mr. Marra, you are an attorney practicing law in
15 the State of New York?

16 A I am.

17 Q And how long have you been practicing law?

18 A Since 1951.

19 Q And during the course of your practice as an
20 attorney, did you come to represent Mr. F. Kenneth Harder,
21 Frank Harder or any of the Harder companies?

22 A Yes, I did.

23 Q And when was the initial representation?

24 A Approximately 1966.

25 Q Could you describe to the Court the circumstances

1 surrounding that representation?

2 A Yes. I was asked whether I would represent them
3 in connection with a proposed merger of a number of their
4 companies. And in that connection I went out to see them
5 and just discussed the matter, and that was my initial
6 contact with them.

7 Q And who introduced you to the Harder family?

8 A Mr. Baker.

9 Q In connection with the -- this proposed merger of
10 the companies, were you given certain documents to examine?

11 A Yes. They -- at the initial meeting, we -- they
12 told me what they wanted done and the first thing I asked
13 for was records relating to the companies and asked the
14 various questions about the matter to see what was involved
15 in the undertaking. One of the -- I recall one of the docu-
16 ments that was presented to me was the -- this black book
17 which is Petitioner's Exhibit 31, is it?

18 Q 32.

19 A 32. Well, it was. They presented that to me and
20 I went through it to see what was there. They told me
21 about all their other companies and we had a general dis-
22 cussion to see what -- just what was involved in putting the
23 companies together.

24 Q And you reviewed Exhibit 32 in its entirety?

25 A Oh, yes.

1 Q Your Honor, I'd like to submit Exhibit 32 in its
2 entirety into evidence at this time.

3 THE COURT: Well, it's merely a duplication of --
4 any objection to --

5 MR. ANTHOLIS: Well, for additional purpose here
6 in that this is the book that Mr. Marra examined in 1966.

7 MS. WESTEN: Well, the objection is the same
8 objection. We have no knowledge of preparation of the book.
9 It's a hearsay document. It contains unexecuted copies,
10 photostatic copies of documents, not originals. It contains
11 the opinion testimony of witnesses who are not before the
12 Court and may not be cross examined. And it's not a business
13 record.

14 THE COURT: You say that these are just duplicates
15 of other exhibits that are already in the record?

16 MR. ANTHOLIS: That's right, Your Honor. I'm only
17 asking --

18 THE COURT: I'll admit it for the purpose that
19 he relied on this as -- it's received for that purpose.
20 Objection is overruled.

21 MR. ANTHOLIS: During the course of your exam-
22 ination of the documents in this -- with respect to the
23 merger, Mr. Marra, did you examine carefully the stock
24 option agreement?

25 A Oh, yes, I did.

1 Q And did you form a legal opinion as to the valid-
2 ity of that document?

3 A Yes, I did form an opinion. I had my own opinion.
4 As an attorney I was counselling the Haiders. The concern --
5 there was a problem --

6 MR. KLETNICK: Objection. The question was did
7 he form an opinion. The witness answered yes, and his
8 testimony thereafter should be stricken as unresponsive.

9 THE COURT: Well, he can answer the question you
10 asked him, then you can ask him what his opinion was.

11 MR. ANTHOLIS: Yes.

12 THE COURT: All right.

13 MR. ANTHOLIS: Did you form an opinion at that
14 time?

15 A Yes, I did.

16 Q Your Honor, before I proceed, are we going to have
17 both counsel objecting to Mr. Marra's testimony?

18 THE COURT: Well, I don't --

19 MS. WESTEN: Your Honor, that was my inadvertent
20 objection. I had objected because of the book, but this
21 witness belongs to Mr. Kletnick.

22 THE COURT: Well, with that understanding from
23 now on the objections will come from the far side of the
24 table. What was your opinion? That was --

25 MR. ANTHOLIS: What was your opinion. Thank you,

1 Your Honor.

2 MR. KLETWICK: Objection. Your Honor, that calls
3 for opinion testimony as to an ultimate fact in the case
4 which is not necessary for expert testimony.

5 THE COURT: I understand that. We have a lawyer
6 on the stand who was representing these people at the time
7 and I'd be anxious to know what his opinion was. It's
8 overruled. He may answer.

9 THE WITNESS: The -- I should know better than
10 to volunteer, but after -- after investigation I did ques-
11 tion the Harders at great length as to the circumstances
12 surrounding this option agreement and I also discussed the
13 matter with Mr. Baker insofar as valuation was concerned
14 and so forth and after having made those investigations and
15 so on I did form an opinion and in my opinion this option
16 agreement was unconscionable.

17 MR. ANTHOLIS: On what basis?

18 A Well, because, first -- several reasons. One
19 reason was I did not think it was appropriate that Mr.
20 Valentine represent all sides in the transaction. Secondly,
21 the value that was placed upon the stock in my view -- in
22 my opinion was unconscionable. It was based strictly on
23 gross sales or gross receipts -- I forget exactly how it
24 was characterized. And in my opinion, although as an
25 attorney over the years having had experience in valuation

1 problems of closely held corporations and estate work and
2 so on and so forth, it was clearly my opinion that this was
3 no way to value that stock. And that I felt that there had
4 been overreaching and I advised the Harders that matters
5 should be taken to Court and we should void the stock option
6 agreement.

7 Q And you passed this opinion on to Mr. Frank Harder
8 and Mr. F. Kenneth Harder?

9 A I advised them clearly and in the strongest terms
10 possible.

11 MR. KLETNICK: Your Honor, we object to this whole
12 line of questioning. It's after the fact and it has nothing
13 to do with the issues in this case. Therefore it is ir-
14 relevant and immaterial.

15 THE COURT: All right. Objection is overruled.
16 You may proceed.

17 MR. ANTHOLIS: Did you know -- you knew, of course,
18 that notwithstanding your advice, the Harders decided to
19 make this payment of \$100,677.44 to Mr. Rogers?

20 A Of course. We discussed that. I -- it was my
21 recommendation that they -- we go to Court and seek to void
22 the contract. Mr. -- I urged that they follow that advice.
23 I gave them the reasons for it.

24 Q What reasons did they give you for making the --

25 A Pardon?

1 Q What reasons did they give you for making the pay-
2 ment?

3 MS. WESTEN: I'm going to object to that.

4 THE WITNESS: Well --

5 MS. WESTEN: The Harders are in the Courtroom and
6 can testify directly and did in fact testify directly.

7 THE COURT: Yes. Well, this is merely corroborative
8 fact. He may answer.

9 THE WITNESS: Mr. Harder said -- explained to me
10 what the fair --

11 MR. ANTHOLIS: Excuse me, Mr. Marra. Which Mr.
12 Harder?

13 A Well, both of them. One -- in this particular
14 case, it was probably Mr. Harder, senior. Explained the
15 longstanding family relationship or acquaintanceship or
16 however you want to characterize it with the Valentine
17 family. They were concerned with the power that they felt --
18 and the influence they felt the Valentine family had. They
19 were extremely reluctant to engage in litigation with the
20 Valentine family for that reason as Mr. Harder testified --

21 THE COURT: Well, Mr. Marra, you're in the
22 Courtroom when both of them testified --

23 THE WITNESS: Yes.

24 THE COURT: -- and heard their testimony --

25 THE WITNESS: Not as --

1 THE COURT: -- if you have anything to add and
2 you agree with that?

3 THE WITNESS: I agree with their testimony.

4 THE COURT: Do you have anything to add to it or --
5 there's no use getting it in the record.

6 THE WITNESS: Yeah. Your Honor, what they tes-
7 tified to is what they told me.

8 THE COURT: All right.

9 MR. ANTHOLIS: Just one more question. This is
10 Joint Exhibit 16P which is a memorandum of closing at which
11 time the payment of \$100,677.44 was paid to Mr. Rogers.
12 This document was prepared by you, right Mr. Marra?

13 A Yes, it was.

14 Q And you represented Harder Tree Service, Inc. at
15 the closing --

16 A Yes, I did.

17 Q -- with Mr. Rogers. No further questions.

18 THE COURT: Any cross examination?

19 MR. KLETNICK: One second, Your Honor.

20 CROSS EXAMINATION

21 BY MR. KLETNICK:

22 Q What firm are you associated with?

23 A Pardon me?

24 Q What law firm are you associated with today?

25 A Actually, none as of today.

1 Q No further questions.

2 THE COURT: Thank you very much. You may step
3 down.

4 (Witness excused.)

5 MR. ANTHOLIS: Your Honor, I'd like to call at
6 this time Mr. William A. Gill.

7 THE COURT: Mr. Gill, would you raise your right
8 hand, please? You do solemnly swear that the testimony you
9 are about to give the Court in this case now in trial will
10 be the truth, the whole truth, and nothing but the truth,
11 so help you God?

12 THE WITNESS: I do, Your Honor.

13 THE COURT: You may take the witness stand and
14 state your name and address for the record, please.

15 THE WITNESS: My name is William A. Gill, G-i-l-l.
16 I live at 34 Fairview Avenue, Madison, New Jersey.

17 WILLIAM A. GILL,
18 called as a witness, having been duly sworn, took the stand
19 and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. ANTHOLIS:

22 Q Mr. Gill, would you tell the Court by whom you
23 are presently employed?

24 A I am employed by Stone and Webster Appraisal
25 Corporation, 90 Broad Street, New York.

1 Q In what capacity?

2 A I am a senior vice-president of that firm.

3 Q And how long have you been employed by Stone and
4 Webster?

5 A I have been employed by Stone and Webster approx-
6 imately five and a half years.

7 Q And during that period, what have been your prime
8 responsibilities?

9 A My prime responsibilities have been to the val-
10 uation of stock of companies as well as financial consultant
11 in the valuation of stocks and assets that have been for
12 the purpose of estate gift, income tax purposes, recapital-
13 ization plans, mergers and acquisitions.

14 Q Prior to your association with Stone and Webster,
15 by whom were you employed?

16 A I was employed for sixteen years by Standard
17 Research Consultants, Incorporated, a wholly owned sub-
18 sidiary of Standard and Poor's Corporation.

19 Q And what were your responsibilities during those
20 sixteen years?

21 A Well, for the last twelve years I was vice-pres-
22 ident of that concern and had similar responsibilities as
23 well as I have now with Stone and Webster, the valuation of
24 stocks and securities and companies.

25 MR. KLETNICK: Your Honor, we object to the

1 relevancy and materiality of this whole line of questioning
2 that petitioner's counsel is about to begin.

3 THE COURT: You mean, only on the basis of the
4 valuation has no relevancy to the case, is that what you're
5 talking about?

6 MR. KLETNICK: That's correct.

7 THE COURT: It will be overruled. You may pro-
8 ceed.

9 MR. ANTHOLIS: Does counsel for the respondent
10 want to stipulate that Mr. Gill is eminently qualified
11 to testify as an expert or would you like me to proceed?

12 MR. KLETNICK: I'd like you to proceed.

13 THE COURT: Do you have a narrative statement of
14 his qualifications?

15 MR. ANTHOLIS: Yes.

16 THE COURT: Well, I'm going to receive that in
17 the record after Mr. Gill testifies that if he were to tes-
18 tify he'd recite what's on that document.

19 THE WITNESS: Yes, I would, Your Honor.

20 THE COURT: All right. I'm going to receive it
21 as qualification of his record, and we're going to recess
22 for a couple of minutes and give respondent a chance to
23 read it.

24 THE CLERK: All rise.

25 (Recess)

1 THE CLERK: Be seated. The Court is now in ses-
2 sion.

3 THE COURT: You may proceed.

4 MR. ANTHOLIS: Mr. Gill, by education, what type
5 of degree do you own?

6 A I own a bachelor of science degree in business
7 administration from Rutgers University.

8 Q Do you have a professional background?

9 A Yes. I am a certified public accountant in the
10 State of New Jersey.

11 Q Have you ever been requested in the course of your
12 professional career with Stone and Webster and with Standard
13 Research Consultants to appraise stock in closely held
14 corporations?

15 A Yes, I have.

16 Q How often? How many times?

17 A Well, numerous times. I can't recall the number but
18 I've testified five or six times as to minority interest
19 in closely held corporations.

20 Q You testified in Court proceedings?

21 A Yes.

22 Q Have you testified --

23 THE COURT: You've qualified in other Federal
24 Courts?

25 THE WITNESS: Yes. And the Tax Court.

1 THE COURT: Yes. I see it's on the resume here.

2 MR. ANTHOLIS: Have we admitted into evidence,
3 Your Honor, Mr. Gill's summary of his --

4 THE COURT: Yes.

5 MR. ANTHOLIS: -- biographical and educational
6 history?

7 THE COURT: It's Exhibit 33.

8 MR. KLETNICK: Your Honor, may we have an oppor-
9 tunity to Voir Dire the witness?

10 MR. ANTHOLIS: Would you like to do that now,
11 Your Honor, or would you want to wait until after Mr. Gill's
12 testimony is concluded?

13 THE COURT: Well, he's asking to take him on
14 Voir Dire and I think I have to permit that. You may pro-
15 ceed. You're not going to try and disqualify -- say he's
16 not qualified? I'm serious.

17 MR. KLETNICK: That's a determination for the
18 Court.

19 THE COURT: I know. But he's already been quali-
20 fied before this Court numerous times.

21 MR. KLETNICK: Your Honor, our position is that
22 this witness is not competent to testify with respect to the
23 issues raised by this case. That the issues raised by this
24 case --

25 THE COURT: All right. Proceed. Proceed.

1 MR. KLETNICK: -- irrelevant and immaterial.

2 THE COURT: Proceed!

3 VOIR DIRE EXAMINATION

4 BY MR. KLETNICK:

5 Q Were you an officer, director or shareholder of
6 Cardinal Maintenance Corporation during 1964?

7 A No, sir.

8 Q Were you an officer, director or shareholder of
9 Harder Tree Services, Incorporated any time during the years
10 1964 through 1968?

11 A No.

12 Q Were you an officer or director or shareholder
13 of Cardinal Maintenance, Inc. at any time during the years
14 1964 through 1967?

15 A No.

16 Q Were you an officer, director or shareholder of
17 Harder Exterminating Services, Inc. at any time during the
18 years 1964 through 1967?

19 A No.

20 Q In the acquisition of Cardinal Maintenance Corp.
21 by Harder Tree Services, Inc. in 1964, did you in any
22 capacity whatsoever represent Cardinal Maintenance Corpora-
23 tion?

24 A I did not.

25 Q Mr. Rogers?

1 A No.

2 Q Harder Tree Services, Inc.?

3 A No.

4 Q Mr. Kenneth Harder?

5 A No.

6 Q Mr. Frank Harder?

7 A No.

8 Q In the acquisition of Mr. Roger's stock in Harder
9 Tree Services by that corporation in 1967, did you in any
10 capacity whatsoever represent the individuals of corpora-
11 tions which I've just named?

12 A I never represented any of them.

13 Q Your Honor, respondent objects to this witness on
14 the basis that he is not competent to testify with respect
15 to the issues raised by this case. He has no personal
16 knowledge of them. That his testimony will be irrelevant
17 and immaterial.

18 THE COURT: Overruled. You may proceed.

19 DIRECT EXAMINATION

20 BY MR. ANTHOLIS: (Resumed)

21 Q Mr. Gill, were you requested by me to appear in
22 this case as a witness?

23 A Yes.

24 Q And did you agree to receive certain remuneration
25 for the testimony you are about to give?

1 A I did.

2 Q And how much is that?

3 A It's not to exceed \$1,000.00 for the study as well
4 as the testimony.

5 Q And is it usual practice that when you give tes-
6 timony before this Court or any other Court that you receive
7 remuneration for the preparation of -- and submission of
8 your testimony?

9 A Yes.

10 Q In the preparation of the testimony you are about
11 to give, were you given certain documents which you were to
12 review?

13 A Yes.

14 Q And could you tell us what those documents were?

15 A I was furnished with the Federal Income Tax Re-
16 turns of Harder Tree Service, Inc. and Cardinal Maintenance,
17 Inc. for the years '64 through '67, I believe. I was fur-
18 nished with certain other documents such as the employment
19 agreement, stock option agreement, and I believe some other
20 miscellaneous documents having to do with this case such as
21 the Internal Revenue Service --

22 Q Did you have an opportunity --

23 A -- communications.

24 Q -- prior to your giving testimony to discuss this
25 matter with the president of Harder Services, Inc., Mr.

1 Frank Harder?

2 A Yes, I've discussed this with Mr. Harder.

3 Q In your professional experience as an appraiser,
4 have you formed a basis for defining the term fair market
5 value in terms of capital stock of a closely held corpora-
6 tion?

7 A My -- the definition of fair market value that I
8 use in valuing stock or property of this type is the price --
9 the property under consideration would change hands in a
10 arms length transaction between a willing buyer and a willing
11 seller, both informed as to pertinent factors of value but
12 neither under any compulsion to buy or sell.

13 Q All right. Consistent with that definition of
14 fair market value, could you tell us what factors you might
15 consider in determining value of stock of a closely held
16 corporation?

17 A Well, the factors that I consider are generally
18 those that are numerated in Revenue ruling 59-60, such as
19 the nature of the business, the history of the enterprise,
20 the economic outlook in general, the condition of the out-
21 look in the industry in particular, the book value of the
22 stock, its financial condition, the earning capacity of the
23 company, its dividend paying capacity, whether or not there
24 was any goodwill to the enterprise or any other intangible
25 values, whether there had been any sales of stock of the

1 company previously, as well as using a comparative basis
2 for looking at stocks of companies in the same or similar
3 line of business that are traded in the marketplace, either
4 over the counter or on the exchange.

5 Q All right. In your analysis of the documentation
6 that was given to you and in your analysis -- in your dis-
7 cussions with Mr. Frank Harder, did you -- from the information
8 that was given to you, were you -- did you determine a value
9 of the common stock of Harder Tree Service as of January
10 29, 1967?

11 A Yes, I did.

12 Q And more particularly, did you form an opinion
13 as to what the value of the twenty-two shares of common
14 stock owned by Mr. Phillip Rogers was as of January 20,
15 1967?

16 A Yes, I did.

17 Q Would you tell the Court what your opinion is as
18 to the value of the twenty-two shares of Harder Tree Service
19 stock owned by Mr. Phillip Rogers?

20 A Objection, Your Honor. This witness' opinion as
21 to the value of the stock is based on documents which are
22 not in evidence and the conversations which he had with the
23 Harders which is not part of the record of this case.
24 Furthermore, respondent objects to this testimony as irrele-
25 vant and immaterial to the issues in this case.

1 THE COURT: What about the documents not being --

2 MR. ANTHOLIS: As to the documentation, Your
3 Honor, the documentation that were furnished -- the documents
4 that were furnished to Mr. Harder by me were the tax returns
5 which are in record --

6 THE COURT: Oh, they're are in the record. All
7 right.

8 MR. ANTHOLIS: -- the stock option agreement which
9 is in the record, the employment covenant agreement which
10 is in record, and Mr. Keith Baker's memorandum of November
11 10, 1966 which is in the record, and Mr. Marra's memorandum
12 of --

13 THE COURT: Yes.

14 MR. ANTHOLIS: -- February which is in record
15 also.

16 THE COURT: I understand. You may proceed. Ob-
17 jection is overruled.

18 THE WITNESS: Yes, sir. I conclude the fair
19 market value of the twenty-two shares, minority block of
20 stock in Harder Tree Service as of January, 1967 was
21 \$4,872.00.

22 MR. ANTHOLIS: And in determining the value of
23 the shares of stock owned by Mr. Rogers in January of 1967,
24 could you tell us what factors you considered?

25 A Yes. I made a study of the company and considered

1 the factors that I assumed were necessary. I understood the
2 Harder Tree Service was incorporated in 1957, it was in the
3 tree and lawn care business, seasonal business. It employed
4 about thirty persons at that time. Of course, it'd be
5 seasonal. From time to time they had anywhere from two
6 thousand customers to twenty -- thirty-five hundred customers
7 in the period that we're talking about, '64 through '66.
8 Cardinal Maintenance was organized and incorporated in May,
9 1963. Its sole stockholder was Phillip A. Rogers. In July
10 of 1964 it was merger with Harder Tree Service, twenty-two
11 shares of that stock were issued to Mr. Rogers. And sub-
12 sequently a new corporation was formed, Cardinal Maintenance
13 Inc. which was incorporated in August 1, 1964. Cardinal
14 Maintenance was involved in the office cleaning type of
15 business. It had far fewer customers than the tree service.
16 They were usually larger customers, and as a result by
17 having fewer customers it was subject to greater risk, gen-
18 erally speaking. They had about an average of 125 employees
19 at around the time of the valuation date. Many of the --
20 many of these being part-time people that would be -- work
21 at these type of jobs after their regular type of work or
22 their main business.

23 MR. KLETNICK: Your Honor, we object. This tes-
24 timony is not based on evidence in the record.

25 THE COURT: Overruled.

1 THE WITNESS: I have prepared some schedules of
2 what I consider as far as the financial condition. These
3 are prepared from the tax returns, the financial condition
4 and the income statements. There are seven of them that
5 lead through. My testimony will lead through as far as what
6 I considered financially and otherwise.

7 MR. ANTHOLIS: Your Honor, I'd like to submit
8 Petitioner's Exhibit 34 for identification.

9 THE CLERK: Petitioner's Exhibit 34 is marked
10 for identification.

11 MR. ANTHOLIS: Mr. Gill, I show you Petitioner's
12 Exhibit 34 for identification and ask you if you would
13 identify this document marked schedules.

14 A Yes, this was prepared by me or under my super-
15 vision. There are seven schedules and there are two
16 attachments to the schedules which support them.

17 Q Would you briefly describe the -- each one of these
18 schedules?

19 A Schedule number one is the balance sheet as of
20 December 31, 1966 of the Harder Tree Service, Inc. It was
21 prepared from the corporate -- Federal Corporate Income
22 Tax Return, and sets forth the balance sheet of the company
23 as of the nearest date to the valuation space.

24 Schedule two is a balance sheet of Cardinal Maintenance,
25 Inc. as of the same date. Also from the same source.

1 Schedule three is a comparative statement of income for
2 Harder Tree Service for the years ending December 31, '64
3 through '66 as well as operating ratios based on, again, the
4 Corporate Income Tax Returns.

5 Schedule number four is the comparative statement of
6 income for Cardinal Maintenance, Inc. for the years ending
7 December 31, '64 through '66. The year '64 is a combination
8 of two returns, the final return for Cardinal Maintenance,
9 Corp. as well as the last -- latter part of the year,
10 Cardinal Maintenance, Inc., for that particular year.

11 Schedule five is a schedule showing the stock price
12 index, price earnings multiples and dividend yields of
13 Standard and Poor's daily stock price index which covers
14 425 industrial common stocks.

15 Schedule six is operating an investment ratios for
16 Harder and Cardinal as well as for two comparative companies
17 that I used in this situation, Allied Maintenance Corpora-
18 tion and American Building Maintenance Industries to develop
19 investors' appraisal of such stocks.

20 Schedule seven are the valuation conclusions I've come
21 to with regard to Harder Tree Service and the subsequent
22 two sheets are information on the two comparative companies
23 that I used.

24 Q Turning to schedule number seven, which is cap-
25 tioned valuation conclusions, would you briefly run through

1 that for us so that we have a clear understanding of what
2 you concluded?

3 A Yes. I reviewed the Corporate Tax Returns and from
4 the schedules three and four set up here, I abstracted the
5 earnings for Harder and Cardinal on a pre-tax basis, combined,
6 then get the net income before taxes for these three years,
7 applied income taxes at a 22% rate, and came up with a net
8 income amount of \$10,590.00 for '64, \$3,630.00 for '65, and
9 \$4,357.00 for '66, an average of \$6,192.00 which I then used
10 to capitalize below the line here at nine times earnings to
11 get a theoretical value of \$55,728.00. I might mention here
12 the \$6,192.00 was more than earned in the two most recent
13 years by looking at this statement and I then combined the
14 book value of Harder and Cardinal as of December 31, '66 from
15 the balance sheets, schedule one and two, for a total of
16 \$41,869.00. The relationship of book value to market price
17 I found for the comparative company was 149%. I applied this
18 to the \$41,000.00 to get a theoretical value of \$62,385.00
19 and averaging these two I found a fair market value of the
20 total enterprise of \$59,057.00 divided by the two hundred
21 shares would indicate a \$295.28 per share value. However,
22 the shares that we are considering here are twenty-two
23 shares, or a minority block in a closely held corporation.
24 Minority blocks in such corporations are generally considered
25 to have much less value due to the

1 fact that there is no way the holder can cause any liqui-
2 dation of the -- to get any book value or any -- has to go
3 along with the policies of the company as adjudged by the
4 majority. So I have applied a 25% discount for lack of
5 marketability as well as the minority interest in this
6 corporation. I get a \$221.46 per share multiplied by the
7 twenty-two shares, giving my value of \$4,872.00 for this
8 block of minority shares.

9 Q I'd like to submit schedules -- Petitioner's
10 Exhibit 34 for identification into evidence.

11 MR. KLETNICK: Respondent objects, Your Honor.
12 The schedules are based on -- in part on two corporations
13 which are not -- facts about them are not in the evidence.
14 There's been no showing that these corporations are in any
15 way whatsoever comparable. He uses the Standard and Poor's
16 analysis as a basis in his calculations but no showing that
17 the Standard and Poor's analysis bears any relationship
18 whatsoever to the Harder Company or Cardinal.

19 THE COURT: Are you finished?

20 MR. KLETNICK: He has failed to demonstrate the
21 relevancy or materiality of the evidence that he has used
22 to the issues in this case.

23 THE COURT: Yes. The objection will be overruled.
24 It will be received in evidence.

25 MR. ANTHOLIS: Your Honor, I have no further